150 U.S. 401

150-401

RECORD, CASE No. 13,976.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO., ~~316~~. 77

ALLEN ROOT, APPELLANT,

vs.

JAMES M. WOOLWORTH.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED FEBRUARY 25, 1890.

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1 Pleas before the Honorable David J. Brewer, judge of the circuit court of the United States for the eighth judicial circuit and district of Nebraska, at the November term, A. D. 1889.

Be it remembered that on the 30th day of May, 1888, a bill was filed in the office of the clerk of said circuit court; which said bill is in words and figures following, to wit:

In Equity.

To the honorable the judges of the United States circuit court, district of Nebraska:

James M. Woolworth, of the city of Omaha and State of Nebraska and a citizen of said State, brings this his bill of complaint against Allen Root, of the same place and a citizen of said State.

And thereupon your orator complains and says:

I. On and a long time before the 18th of January, 1860, Roswell G. Pierce was seized in fee of the premises hereinafter described and was divested thereof by the judicial proceedings hereinafter set forth. Said Pierce being indebted to Oliver P. Morton in a large sum of money, the said Morton, on the 27th day of June, 1865, commenced a suit against the said Pierce in the district court of the late Territory of Nebraska within and for the county of Douglas, in which action an order of attachment issued to the sheriff of said county in due form of law commanding him to attach the goods, chattels, lands, and tenements of the said Pierce, and upon the said order the said sheriff attached the said premises, and at the term of October, of the year last aforesaid, the said Morton recovered a judgment of said court against the said Pierce for $2,739.00 for his damages and $25.00 for his costs and an order for the sale of said premises to satisfy said judgment. On the 18th day of May, 1868, an order of sale issued out of said court commanding the said sheriff to sell the said lands for the satisfaction of the said judgment, and, after due proceedings in that behalf, he,
2 on the 29th day of June, 1868, sold the same in obedience to the command of the said writ to the said Morton for $1,775.00, and at the term of July following the said court duly confirmed the said sale and directed said sheriff to convey the said premises to the said Morton, which he accordingly did by his deed in due form of law dated the 30th of April, 1869.

II. On the 18th day of January, 1860, one Heman Class commenced against said Price his certain civil action in the above-mentioned court in attachment and in his action recovered judgment for a large sum of money. The lands and premises above referred to were not attached in the said action nor was the said Pierce served with process therein nor did he appear thereto, and said court had jurisdiction to render its judgment solely by virtue of an order of attachment levied upon premises other than those above referred to. On the 31st of July, 1861, the said Glass sued

out of the said court a general execution directed to the sheriff of said county, commanding him that of the goods and chattels and for want thereof then of the lands and tenements of the said Pierce he should cause to be made the sum remaining unpaid on the said judgment. Said sheriff levied the said pretended execution upon the said premises and sold the same in obedience to the command thereof, and the said court confirmed said sale, and the said sheriff made to the said Glass his deed in due form of law, conveying to the said Glass said premises; which deed was recorded in the registry of said county on the 30th of September, 1861, in Book of Deeds M, at page 531.

III. Conflict having thus arisen between the two titles above set forth, on the 6th day of January, 1866, said Morton exhibited his bill of complaint in the said court, impleading therein the said Glass and Pierce, alleging the matters hereinbefore recited, and, the said Glass having duly appeared to the said bill and answered the same, such proceedings were had in said suit that at the term of October, in the said year, a decree was rendered whereby it was declared that the aforesaid judgment by the said Glass recovered against the said Pierce was never a lien upon the premises above referred to and that the title thereto was not effected by the pretended sale thereof by the said sheriff to the said Glass. On the 2nd of July, 1866—that is to say, pending the bill of complaint last above mentioned—a deed bearing date of 10th of December, 1864, made between the said Glass, as party of the first part, and Allen Root, as party of the second part, purporting to convey the premises first above referred to, was placed upon the records of the registry of said county.

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IV. On the 27th of August, 1870, said Morton exhibited his certain bill of complaint in this honorable court against the said Allen Root, alleging the matters hereinbefore stated, to which bill the said Root, on the 24th day of February, 1872, filed his answer. In the said answer he insisted that the judicial proceedings hereinbefore referred to, whereby the said Glass claimed the title to the said premises, were good and effectual to vest the said title in him, and that the judicial proceedings whereby the said Morton claimed to have acquired the title to the said premises were illegal and invalid and ineffectual to pass the title to the said premises to the said Morton; that such proceedings were had upon the said bill that on the 8th of May, 1873, a decree was rendered by this court, upon the pleadings, proofs, and exhibits in the said suit, wherein it was ordered, adjudged, and declared that the judgment recovered by the said Glass against the said Pierce hereinbefore mentioned was never a lien upon said premises, and the deed made by the said sheriff to the said Glass and the deed by the said Glass to the said Root were — each and every of them was utterly void and of no effect, and that within 10 days from the date of said decree the said Root make a conveyance thereof to the said Morton, and that if he failed so to do Watson B. Smith, who was thereby appointed a master in that behalf, *to* make such conveyance in place of the said defendant, said Root having failed to make the said deed

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as by the said decree directed. Said Smith, as master aforesaid, made his deed in due form of law, whereby, on behalf of the said Root, he conveyed the said premises to the said Morton; which deed was recorded in the registry of said county, in Book of Deeds —, at page 346, on the 14th day of July, 1873.

V. On the 19th of August, 1869, the said Oliver P. Morton, together with Lancinda M., his wife, for the consideration of $1,000.00 to him paid, made an instrument in writing purporting to convey the said premises to William S. T. Morton, but the said deed was ineffectual for that purpose because it was not made in the presence of and attested by a witness. Afterwards, on or before the 24th day of June, 1873, said Oliver P. Morton and Lancinda M., his wife, by the direction and at the request of the said William S. T. Morton, by their deed of conveyance bearing date on said day and by them duly executed and acknowledged, did grant, sell, remise, release, and forever quitclaim the equal undivided half of the said premises to your orator; which deed was duly recorded in the registry of said county on the 12th of June, 1873, in Book 14 of Deeds, at page 341, as by said instrument, in the hands of your orator, ready to be produced as your honors shall direct, will more fully appear. Afterwards it was by and between the said Oliver P. and William S. T. Morton agreed and understood that the said title acquired by the said Oliver P. under and by virtue of the judicial proceedings and the sheriff's deed to him first above set forth should be taken, held, and treated as the property of William S. T. Morton, and that a conveyance should be made by the said Oliver P. Morton in order to vest the legal title to the said premises in the said William, but the said Oliver P. and William S. T. Morton both died before the said conveyance had been executed. Said William S. T. Morton left a will, whereof he appointed Thomas McCollough and William A. Weelle executors and Eliza M. Morton, his wife, executrix, with full power, as therein expressed, to sell and convey any and all real estate of which he died seized; which will was duly proved in the office of the clerk of the circuit court of Wayne —, in the State of Indiana, and letters were thereupon duly issued out of said court to them. On the 4th of June, 1879, your orator purchased the undivided half of the said premises from the said executor and executrix and paid to them therefor $443.75, and thereupon said executors and executrix made their certain deed, bearing date on said day, whereby they conveyed to your orator the undivided half of said premises; which deed was duly executed and acknowledged and was on the 25-h of June, in said year, duly recorded in the registry of said county, in Book 28 of Deeds, at page 94, as by the said deed, in the hands of your orator, ready to be produced as your honors shall direct, will upon reference thereto more fully appear.

VI. The said William S. T. Morton purchased the undivided half of said premises from the said Oliver P. Morton and paid to him the full consideration thereof in the belief that by virtue of the decree of the district court of the late Territory of Nebraska herein-

before mentioned and by virtue of the judicial proceedings had and taken by him as plaintiff against said Pierce and the sheriff's deed to him of the said premises a good title was vested in him, and your orator purchased said premises and paid therefor to the said Oliver P. Morton and the said William S. T. Morton a consideration exceeding $1,000.00 in a like belief, and took the title of the said premises from the said Oliver P. Morton and the executors and executrix of the last will and testament of the said William S. T. Morton in the like belief.

VII. In 1873 your orator and the said William S. T. Morton entered into the said premises, and from that time to this your orator has paid all the taxes which at any time have been levied or assessed upon the said premises by the city of Omaha and the county of Douglas and the State of Nebraska, unless some such taxes have accident-ly escaped his attention, and the said defendant has never paid any taxes levied or assessed thereon, as your orator is informed and believes.

VIII. On the 2nd day of August, 1883, your orator laid out said land — an addition to the city of Omaha, under the name of Oakhurst, into lots, blocks, streets, and alleys, and duly filed a plat thereof in the registry of said county and obtained approval of the same of the city council of said city, since which time taxes, both of the city and said county, have been levied and assessed upon the said premises as lots. Shortly thereafter your orator began to sell lots into which the tract had been divided and made sales of six o-more lots, and afterwards, in the year- 1885 and 1886, he repurchased four of the lots so sold and conveyed by nim, paying a large consideration therefor. All of the said proceedings, as hereinbefore stated, were known to the said defendant Root, but he made no claim to the said premises or any part thereof until, as your orator is informed and believes, about one month ago.

IX. Thereupon the said Root, as your orator is informed and believes, took possession of the said premises and built a fence around the same and also a house thereon, into which he has removed with his family, and he has given it out to the public that he will lease parts of the said premises to any person or party who will build a house thereon and occupy the same, and he has already induced some persons, whose names are to your orators unknown, to accept his said offers, and he is exercising great diligence and energy in securing others who will in like manner occupy part of the said premises upon the same terms. His object in these proceedings is — multiply actions to which your orator will be driven in order to recover possession of the said premises and establishe his right thereto. In entering upon the said premises and claiming the same the said defendant, as your orator believes, claims no rights except such as were derived by him from the said Glass.

X. In order to carry the decree of this court made on the 8th of May, 1873, into execution and give to your orators the full benefit thereof it is necessary that it shall be supplemented by an order of injunction hereinafter prayed, and unless such injunction be allowed

to your orator such decree will be ineffective and your orator will be subjected to a multiplicity of suits in order to recover possession of the said premises from the parties to whom said defendant will lease the same. If left to himself not only will the said defendant subject your orator to numerous actions for the recovery of the possession of said premises from many parties whom the said defendant will induce to enter upon the same, but, as your orator is informed and believes, the said defendant threatens to and unless restrained by the order and injunction of your honors will institute divers actions in respect of the title of the said premises and thereby vex, annoy, and harass your orator.

XI. In the judicial proceedings first above recited and the sheriff's deed to Oliver P. Morton the said premises are described as follows: All that piece of land beginning at the northwest corner of section twenty-eight, thence south eight chains and five links; thence south eighty-five degrees twenty chains and two links; thence north nine chains and twenty links; thence west twenty chains to the place of beginning, all being in township fifteen, range thirteen east of the sixth principal meridian, in said county of Douglas.

8 There is an apparent obscurity, and the defendant claims a radical defect in the said description because the word east is omitted after the word eighty-five in the second call thereof. But in the bill in equity exhibited in this honorable court by the said Oliver P. Morton the sufficiency of the above description was considered by the judges, who held that the said omission was not a defect, and that notwithstanding the same the title passed by the said proceedings and deed to said Oliver P. Morton. The said premises are of the value of $50,000.00.

And your orator well hoped that the said defendant would have desisted from interfering with said premises, but he refuses so to do; all which actings, doings, and refusals are contrary to equity and good conscience and tend to the manifest wrong, injury, and oppression of your orator in the premises.

In tender consideration whereof, and forasmuch as your orator is without relief in a court of law and can only have relief in this honorable court, where matters of this and the like nature are properly cognizable—

To the end, therefore, that your orator may have the relief herein prayed, and that the said defendant may answer this your orator's bill according to the course and practice of the court, but not under oath, his answer under oath being hereby expressly waived, and that the said defendant be, by the order and injunction of your honors, enjoined and restrained from asserting any rights, title, or interest in the said premises, and from occupying the same or any part thereof or leasing or pretending to lease or admitting under any pretense whatever any party save said plaintiff into the said premises or upon the same or any part or parcel thereof, and from making any verbal or written contract, lease, deed, or conveyance affecting the said premises or the possession thereof or the title

thereto or any part thereof, and from excluding your orator
9 from the said premises or any part thereof or preventing him taking sole and exclusive possession of the same, and from bringing any action or actions touching the title or possession of said premises, and that by the decree of your honors it be declared that the said defendant is not and never had any interest whatever in the said lands, as in and by the two several decrees hereinbefore mentioned has already been declared and adjudged, and that a writ of possession issue out of this court and under the seal thereof directed to the marshal, commanding him summarily to remove said defendant and his tenants and agents therefrom, and that it be decreed that the injunction hereinbefore prayed be made perpetual, and that your orator have his costs of this suit and such other and further relief as the circumstances require and is agreeable to equity and good conscience—

May it please your honors to grant unto your orator not only the writ of injunction issuing out of and under the seal of this honorable court, directed to the said defendant, Allen Root, commanding and enjoining him as hereinbefore prayed, but also the writ of subpœna issuing in like manner and directed to the said defendant, commanding him at a date therein to be inserted, *he* be and appear before your honors in this honorable court, then and there to answer the premises and stand to and perform and abide such order and decree as to your honors shall seem meet and equitable.

And your orator will ever pray, etc.

JAMES M. WOOLWORTH,
Plaintiff in Person.

DISTRICT OF NEBRASKA, *ss:*

James M. Woolworth, being duly sworn, says that he is the plaintiff in the foregoing bill; that he has read the same and knows the contents thereof, and the same is true of his own personal
10 knowledge except as to the matters therein stated on information and belief, and as to these matters he believes it to be true.

JAMES M. WOOLWORTH.

Subscribed and sworn to before me this 30th day of May, 1888.
ELMER S. DUNDY, *Judge.*

On reading the above bill it is ordered that a restraining order be issued by the clerk, directed to the said defendant, restraining him as in said bill prayed, upon the plaintiff giving a bond conditioned according to law in the penal sum of $1,000, with sureties to be approved by the clerk.

Dated Omaha, May 30th, 1888.

(S'g'd) ELMER S. DUNDY, *Judge.*

Upon the back of said bill appear endorsements in words and figures following, to wit: No. 212, M. United States circuit court, district of Nebraska. James M. Woolworth *vs.* Allen Root. Bill.

Filed May 30, 1888. Elmer D. Frank, clerk. J. M. Woolworth, pl'ffs in person.

Thereupon, afterwards, at the May term of said court, on the 30th day of May, 1888, the following proceedings were had and done in said cause, as appears of record on folio 825, Journal "M" of said court, to wit:

JAMES M. WOOLWORTH
vs.
ALLEN ROOT. } 212, M.

On reading the bill of complaint herein, it is now, on this day, ordered by the court that a restraining order be issued by the clerk, directed to the said defendant, restraining him as in said bill prayed, upon the complainant giving a bond conditioned according to law in the penal sum of one thousand dollars, with sureties to be approved by the clerk.

(S'g'd) ELMER S. DUNDY, *Judge.*

11 Thereupon, afterwards, to wit, on the 31st day of May, A. D. 1888, a subpœna was duly issued in said case and returned and filed June 7, A. D. 1888; which said subpœna in chancery is in words and figures following, to wit:

UNITED STATES OF AMERICA, } *ss:*
District of Nebraska, }

The President of the United States of America to Allen Root, Greeting:

We command you that you appear before the judges of the circuit court of the United States for the district of Nebraska, at Omaha, on the first Monday in July next, it being the 2nd day of July, A. D. 1888, to answer to the bill of complaint of James M. Woolworth, filed in the office of the clerk of said court May 30, 1888, and then and there to receive and abide by such order and decree as shall then or thereafter be made, upon paid of the said bill being taken as confessed against you and decree pronounced accordingly.

Witness the Hon. Samuel F. Miller, acting Chief Justice of the Supreme Court of the United States, at Omaha, this 31st day of May, A. D. 1888, and of the Independence of the 112th year.

[SEAL.] ELMER D. FRANK, *Clerk.*

Memorandum.

The above-named defendant is notified that unless he enter his appearance in the clerk's office of said court, at Omaha, on or before the day to which the above writ is returnable, as above stated, the complaint will be taken against him as confessed and a decree entered thereon accordingly.

ELMER D. FRANK, *Clerk.*

Attached to said subpœna are the returns of the marshal in words and figures following, to wit:

12 DISTRICT OF NEBRASKA, *ss*:

I hereby certify and return that on the 31st day of May, 1888, I received this subpœna, and on the 31st day of May, 1888, I served the same upon the within-named Allen Root, in Douglas county, State and district of Nebraska, by delivering to and leaving with him a certified copy thereof, with all the endorsements thereon.

ELLIS L. BIERBOWER,
United States Marshal for the District of Nebraska,
By WM. HEPFINGER,
Deputy United States Marshal.

UNITED STATES OF AMERICA, }
District of Nebraska. }

OMAHA, *May* 31, 1888.

I hereby appoint William Hepfinger my true and lawful deputy to serve the within writ.

ELLIS L. BIERBOWER,
United States Marshal.

I hereby solemnly swear that the return made on the attached writ is true and correct.

WM. HEPFINGER.

Subscribed and sworn to before me this 1st day of June, 1888.
[SEAL.] R. E. ALLEN,
Notary Public.

Upon the back of said subpoena appear endorsements in words and figures following, to wit: No. 212, M. Circuit Court of the United States for the district of Nebraska. In chancery. James M. Woolworth *vs.* Allen Root. Subpœna in chancery. Returnable to rule day, first Monday in July, 1888. Elmer D. Frank, clerk. Filed Jun- 7, 1888. Elmer D. Frank, clerk. James M. Woolworth, pl'ff in person. Mar'l costs on injunction.

Thereupon, afterwards, to wit, on the 1st day of August, 1888, demurrer of Allen Root to plaintiff's bill of complaint was filed in said case; which said demurrer is in words and figures following, to wit:

13 *Demurrer.*

In the Circuit Court of the United States for the District of Nebraska.

JAMES M. WOOLWORTH
vs.
ALLEN ROOT. } Demurrer.

The demurrer of defendant, Allen Root, to the bill of complaint of James M. Woolworth, plaintiff.

This defendant, by protestation, not confessing or acknowledging all or any of the matters in the said plaintiff's bill to be true in such manner and form as the same are therein set forth or alleged, does demur thereto and for cause of demurrer shows—

1. That the said plaintiff has not in and by his said bill made or stated such a case as doth or ought to entitle him to any such relief as is thereby sought or prayed for from or against this defendant.

2. That this court has no jurisdiction of the person of this defendant or of the subject of this action, as it appears on the face of said bill that plaintiff and defendant are both citizens of the State of Nebraska.

3. That it appears on the face of complainant's bill that he has an adequate remedy at law and is not entitled to maintain this action in equity.

4. That the said plaintiff's bill does not state facts sufficient to constitute a cause of action in favor of plaintiff and against this defendant.

Wherefore this defendant demands the judgment of this honorable court whether he shall be compelled to make any further answer or other answer to the said bill or any of the matters and things therein contained, and prays to be hence dismissed with his reasonable costs in this behalf sustained.

14 GEORGE W. COVELL,
JNO. L. WEBSTER,
Solicitors for Defendant.

DISTRICT AND STATE OF NEBRASKA, } *ss:*
County of Douglas, }

Allen Root, being duly sworn, says that the above demurrer is not interposed for delay; that this deponent is the demur-ant in the said demurrer.

ALLEN ROOT.

Subscribed in my presence and sworn to before me this 30th day of June, A. D. 1888.

[SEAL.] P. W. BIRKHOUSER,
Notary Public.

We, G. W. Covell and J. L. Webster, counselors of said court, do hereby certify that in our opinion the above demurrer is well founded in point of law.

GEORGE W. COVELL,
JNO. L. WEBSTER,
Counselors-at-Law.

Dated at Omaha, June 30th, 1888.

Upon the back of said demurrer appear endorsements in words and figures following, to wit: No. 212, M. James M. Woolworth, plaintiff, *vs.* Allen Root, defendant. Demurrer of Allen Root to plaintiff's bill of complaint. Filed Aug. 1, 1888. Elmer D. Frank, clerk. George W. Covell & John L. Webster, solicitors for defendant.

Thereupon, afterwards, to wit, at the November term of said court, on the 15th day of November, 1888, the following proceedings were had and done in said cause as appears of record on folio —, Journal "N" of said court, to wit:

JAMES M. WOOLWORTH
vs.
ALLEN ROOT. } Demurrer Overruled.

This cause having been argued and submitted to the court on the demurrer to the bill of complaint herein, the court does, after careful consideration thereof, now, on this day, overrule the same, and, on motion, leave is granted defendant by the court to file answer herein by January rules.

15 Thereupon, afterwards, to wit, on the 5th day of January, 1889, answer of Allen Root was filed in said cause; which said answer is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

JAMES M. WOOLWORTH, Complainant,
vs.
ALLEN ROOT, Defendant. } No. 212, M. In Equity.

To the honorable the judges of the United States circuit court, district of Nebraska.

The Answer of Allen Root, the Defendant, to the Bill of Complaint of James M. Woolworth, Complainant.

1. This defendant, now and at all times hereafter saving and reserving unto himself all benefit, right, and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in said complainant's said bill of complaint contained, and further reserving unto himself all right of exception and objection to the jurisdiction of this court in this proceeding, heretofore interposed by demurrer to the said bill of complaint, for answer thereunto, or unto so much and such parts thereof

as this defendant is advised is or are material or necessary for him to make answer unto, this defendant, answering, denies that Roswell G. Pierce was for a long time before the 18th day of January, 1860, *siezed* in fee of the tract of land described in complainant's bill of complaint as follows: "All that piece of land beginning at the northwest corner of section twenty-eight, thence south eight chains and five links, thence south eighty-five degrees twenty chains and two links, thence north nine chains and twenty links, thence west twenty chains to the place of beginning, all being in township fifteen, range thirteen east of the sixth principal meridian in said
16 county of Douglas," and denies that the said Roswell G. Pierce was divested thereof by the judicial proceedings first recoted in said complainant's bill of complaint, namely, the suit by attachment brought by Oliver P. Morton on the 27th day of June, 1865, in the district court of the late Territory of Nebraska within and for the county of Douglas.

This defendant, further answering said bill of complaint, denies that the sheriff of Douglas county in said action upon an order of attachment issued in said suit attached and levied upon any lands or premises belonging to Roswell G. Pierce or any part thereof, and particularly the premises in controversy, and denies that said Morton recovered a valid judgment of said court against the said Pierce for $2,739.00 for his damages and $25.00 for his costs, but alleges that the pretended judgment of said court against the said Price was never a lien against said premises and was utterly void and of non-effect because there was never any attachment made of the premises described in complainant's bill of complaint, and that by reason thereof said court had no jurisdiction to render any judgment whatever in favor of said Oliver P. Morton and against Roswell G. Pierce or to make or issue any order of sale of said premises.

This defendant, further answering complainant's bill, alleges that one Jane A. North, on the 30th day of July, 1857, pre-empted at the United States land office and thereby acquired the title to the west half of the northwest quarter (W. ½ N. W. ¼) of section twenty-eight (28), in township fifteen (15) north, of range thirteen (13) east, in Douglas county, Nebraska, in which is situated the premises described in complainant's bill, provided that said description of said premises contained the word "east" immediately following the words "eighty-five degrees" and preceding the words "twenty chains," and that the said Jane A. North never parted with
17 the title of said premises by virtue of any deed made by her to any person or persons while the title thereof was vested in her; but this defendant alleges that on the 27th day of November, 1861, one William Wade, in an action brought by him in the district court of Douglas county, Territory of Nebraska, obtained a decree of said district court against the said Jane A. North and one Horace Green, ordering and decreeing that the said Jane A. North *executed* and *delivered* to said complainant, William Wade, a deed in fee simple, absolutely conveying the said west half of the northwest quarter of said section twenty-eight (28), in said township and

range, to him, the said Wade; which said decree is found of record in Journal "C" of the records *and* said district court, on page 55 thereof, whereby this defendant claims that the title of all of said premises vested in the said William Wade.

But if it should be held that said decree did not vest the title of said premises in the said William Wade, yet the complainant in this action has no title in or to said premises or any part thereof, by reason of the facts further on in this answer mentioned and recited, and no right to maintain his bill herein.

This defendant, further answering the said complainant's bill, denies that the sheriff of Douglas county duly conveyed the premises in controversy to the said Oliver P. Morton by deed in due form of law dated either April 13th, 1869, or April 30th, 1869, but alleges that the said pretended sheriff's deed does not recite the date of the alleged sale of said premises, nor that the said alleged sale was made to the highest bidder, nor the price for which the said premises were sold, and that the said pretended sheriff's deed was not acknowledged by Aaron R. Hoel as sheriff of Douglas county, but merely by him as an individual, and not by him in his capacity as sheriff, and that by reason thereof and the indefinite and uncertain description
18 of the premises therein and because the said premises were not attached the said so-called sheriff's deed conveyed no title to Oliver P. Morton in and to said premises.

But this defendant alleges that the premises in controversy never were attached at the suit of Oliver P. Morton as the property of Roswell G. Pierce by the levy of any legal and valid writ of attachment thereon issued in said suit.

II. This defendant, further answering said complainant's bill of complaint, denies that any valid decree was rendered or entered by the district court of Douglas county, Territory of Nebraska, in the proceedings alleged in the complainant's bill in favor of Oliver P. Morton against Herman Glass and Roswell G. Pierce at the October term of said court for the year 1866 of the nature and effect alleged in complainant's bill, but alleges that whatever pretended decree was rendered therein was obtained by fraud practiced upon said court by the said Oliver P. Morton and the said James M. Woolworth, as his attorney, by pretending and alleging that the said Morton had then acquired, by virtue of his said alleged attachment proceedings against Roswell G. Pierce, all the right, title, and interest which the said Pierce had in and to said premises, when *the* they and each of *then* well knew that the said Morton had not acquired at the date of the rendition of said decree the apparent title and interest claimed to be held by said Roswell G. Pierce in and to said premises, and this defendant therefore alleges that the said decree was by reason thereof absolutely void and of non effect.

And defendant further alleges and avers that the premises in controversy in this proceedings were not described in the bill of complaint of Oliver P. Morton *vs.* Herman Glass and Roswell G. Pierce in said territorial court and in the pretended decree rendered therein, and that by reason thereof the premises in controversy were not affected by said pretended decree, and that the same was

void and of non effect as to the premises in controversy in this proceeding.

19 III. And this defendant, further answering complainant's bill of complaint, admits that on the 27th day of August, 1870, Oliver P. Morton exhibited his certain bill of complaint in this honorable court against this defendant, alleging substantially the same matters contained in the first, second, and third paragraphs of this complainant's bill, to which bill of complaint of Oliver P. Morton this defendant answered on the 24th day of February, 1872, in which answer defendant alleged and insisted that the judicial proceedings whereby the said Oliver P. Morton claimed to have acquired the title to the said premises were illegal and invalid and ineffectual to pas*d* the title to said premises to the said Morton by reason of the unlawful, void, and uncertain description of the alleged lands and premises in the alleged order or writ of attachment, the alleged return thereon, the alleged judgment or decree and order of sale, the alleged return of the sheriff thereon, the alleged appraisement of said premises, the alleged notice of sale thereof, the alleged report of sale, the alleged order of confirmation of sale, and the alleged sheriff's deed of said premises to Oliver P. Morton, and that such proceedings were had upon said Morton's bill that on the 8th day of May, 1873, this honorable court, by the Honorable John F. Dillon, circuit judge, found upon the pleadings, proofs, and exhibots produced by and on behalf of said complainant, Morton, and the defendant, Root, that the said Morton, "plaintiff, is clearly the owner of the land in question and is entitled to the relief prayed, which is to remove the cloud upon his title and not for possession;" that thereupon the following decree was entered in this court in said cause:

"OLIVER P. MORTON
vs.
"ALLEN ROOT.

"This cause came on to be heard upon the pleadings,
20 proofs, and exhibits at a former term of the court and was argued by counsel, and the court took time to consider the same, and now, being fully advised in the premises, it is ordered, adjudged, and decreed by the court as follows—that is to say: That the judgment recovered by Herman Glass against Roswell G. Pierce in the district court of the Territory of Nebraska within and for Douglas county, at the term thereof of July, 1860, was not and never was a lien upon the premises here in question; that the sale of said premises upon execution issued out of said court upon said judgment, and a deed made by the sheriff of said county purporting to convey the said premises to said Glass, and also the deed made by said Glass pretending to convey said premises to said defendant were and each and every thereof was utterly void and of non effect, and that the said proceedings and deed do cast a cloud upon the title to said lands whereof said plaintiff is seized in fee; and it is therefore ordered, adjudged, and decreed that the said defendant,

within ten days from the date of this decree, make a conveyance to be by him duly executed and acknowledged, so as to entitle the same to be recorded in the registry of deeds of said county, conveying and releasing the said premises to the said plaintiff, and if the said defendant shall fail to make such conveyance within the time so limited that Watson B. Smith, who is hereby appointed master in that behalf, make said conveyance in place of said defendant, and that the said conveyance so by the said master to be made be as effectual in all respects as if made by the said defendant; and it is further ordered and adjudged that the said plaintiff have and recover of and against the said defendant his costs in this suit, taxed at $89.96, and that execution issue therefor. The premises hereinbefore referred to and by this decree affected and ordered to be conveyed are described as follows: "All that piece of land beginning at the northwest corner of section 28, thence south eight
21 chains and five links, thence south 85 degrees 20 chains and ten links, thence north none chains and 70 links, thence west 20 chains to the place of beginning, in township 15, range 13 east of the 6th principal meridian."

This defendant further admits that he failed to make the said deed as by said decree directed, and that the said Watson B. Smith on the 12th day of June, 1873, as special master in chancery, made his deed on behalf of said Root to the said Morton, describing the said premises and purporting to convey the same, and that said deed was recorded July 14th, 1873, in Book 14 of Deeds in the registry of Douglass county, at page 346.

But this defendant alleges that the said decree of this honorable court was obtained by the said Oliver P. Morton, plaintiff, and by the said James M. Woolworth, as his attorney and solicitor in that suit, by fraud practiced upon this honorable court by them and each of them by pretending and alleging that on the 27th day of August, 1870, which was the date of the filing of the said bill by the said Oliver P. Morton in this honorable court, he, the said Morton, was seized in fee of said premises, and *and* by exhibiting to this honorable court as evidence of title in the said Morton a certified copy of the record of the alleged sheriff's deed of said premises purporting to have been made and executed by Aaron R. Hoel as sheriff of Douglas county, Nebraska, on the 13th day of April, 1869, well knowing that the decree and all the proceedings in the said territorial court, in which said sheriff's deed was ordered to be made and by virtue of which it was executed, were void and of non effect as aforesaid, and that said sheriff's deed conveyed no title and by studiously concealing from this honorable court the fact that the said Oliver P. Morton and his wife, Lucinda, had, on the 19th day of August, 1869, made, executed, and delivered to one William
22 S. T. Morton a quitclaim deed to said premises, which deed was duly executed and acknowledged according to the laws of the State of Indiana in the county of Wayne, in said State, by which all of the alleged right, title, interest, estate, claim, and demand, both at law and in equity, of the said Oliver P. Morton, if any he had, in and to said premises were conveyed to the said Wil-

liam S. T. Morton, and which said deed was on the 15th day of September, 1869, duly recorded in the registry of deeds of Douglas county, Nebraska, in Book No. Seven (7) of Deeds, at page 154; and this defendant alleges that at the date of the exhibition of his said bill by the said Oliver P. Morton in this court he had no right, title, or interest in or to said premises, but that all the title he ever had, if any, in and to said premises was at that date and at the date of the rendition of said decree in and by this honorable court held and owned by the said William S. T. Morton, and that by reason of the fraud so aforesaid practiced upon this honorable court the said decree was void and of none effect and vested no right whatever in the said Oliver P. Morton, and that he had no right whatever to maintain his said bill against this defendant to remove said cloud from his alleged title and no right whatever to obtain the said decree of this honorable court against this defendant, and that by reason thereof he, the said Oliver P. Morton, acquired no right or title thereby nor by virtue of the said conveyance by the said Watson B. Smith, as master in chancery, to him of said premises therein or thereto; and this defendant alleges that at the date of the filing by said Oliver P. Morton of his said bill against this defendant and at the date of the rendition by this honorable court of the decree he had no knowledge or information whatever that the said Oliver P. Morton and Lucinda, his wife, had deeded on the 19th day of August, A. D. 1869, the premises in controversy to the said William S. T. Morton, and that he acquired his first knowledge and information thereof since the filing of the present bill by the said James M. Woolworth.

IV. And this defendant, further answering complainant's bill of complaint, denies that the deed from Oliver P. Morton and Lucinda, his wife, to William S. T. Morton, of date August 19th, 1869, purporting to convey to him all of the right, title, and interest of the said Oliver P. Morton in and to said premises, if any he had, was ineffectual for that purpose because the same was not made in the presence of an attesting witness, but this defendant alleges on
23 information and belief that, if Oliver P. Morton at the date of said deed had any right, title, interest, or estate therein which he could convey, the same was effectually conveyed by said deed from him and his said wife to the said William S. T. Morton.

Defendant admits that on or about the 24th day of June, 1873, Oliver P. Morton and Lucinda, his wife, quitclaimed the undivided half of said premises to James M. Woolworth for the expressed consideration of fifty dollars, but denies that they did this at the request of William S. T. Morton. Defendant admits that said quitclaim deed is recorded in the registry of Douglas county, Nebraska, in Book 14 of Deeds, at page 341; but this defendant alleges that the said Oliver P. Morton conveyed no title thereby to the said James M. Woolworth in and to said premises, because he had no title, interest, or estate to convey, and that the said James M. Woolworth acquired no title, right, or interest in and to said premises thereby.

Defendant denies that it was afterwards agreed and understood by and between the said Oliver P. and William S. T. Morton that

the alleged title acquired by the said Oliver P. Morton by virtue of the judicial proceedings prosecuted by him against Roswell G. Pierce and the sheriff's deed to him thereunder should be taken, held, and treated as the property of William S. T. Morton, and denies that it was agreed and understood between them afterwards that a conveyance should be made by Oliver P. Morton in order to vest the legal title to the said premises in the said William, and denies that the said Oliver P. Morton and William S. T. Morton both died before such conveyance had been executed; but defendant alleges that the said Oliver P. Morton and Lucinda, his wife, on or about the 24th day of June, 1873, quitclaimed for an expressed consideration of fifty dollars the other undivided half of said premises to William S. T. Morton, which deed was recorded in the registry of deeds of Douglas county, in Book 14 of Deeds, at page 347; but this defend-
24 ant alleges that the said Oliver P. Morton conveyed no title thereby in or to said premises to the said William S. T. Morton, because he had no title whatever therein or estate to convey, and that the said William S. T. Morton acquired no title, right, or interest in or to said premises thereby.

This defendant, further answering complainant's bill of complaint, says that he believes it may be true that the said William S. T. Morton left a will, whereof he appointed Horace McCullough, William A. Peeble, executors, and Eliza M. Morton, his wife, executrix, but denies that said will gave the said executors and executrix full powers to sell and convey any real estate of which he died seized, and he believes it may be true that said will was duly proved in the office of the clerk of the circuit court of Wayne —, in the State of Indiana, and that letters were thereupon duly issued out of said court to them, but this defendant does not know the same of his own knowledge and has never seen or been able to discover any record or memorial of any such will or the probate thereof; and this defendant therefore insists that said complainant be required to prove such alleged will and probate thereof, if he can, in the same manner that he would be required to do had the execution and probate thereof been fully and directly denied by this defendant.

And this defendant, further answering complainant's bill, denies that the said complainant purchased the undivided half of said premises from the said executors and executrix and paid to them therefor $143.75 on the 4th day of June, 1879, and denies that they thereupon conveyed the undivided half of said premises to complainant by their deed duly executed and acknowledged, and as to whether there is any deed of that date made by said executors and executrix recorded in Book 28 of Deeds in the registry of Douglas county, at page 94, he has no knowledge or information suf-
25 ficient to form a belief, and he therefore denies the same; and this defendant alleges that if said executors and executrix did so execute their deed to said James M. Woolworth for the undivided half of said premises they did not convey to him any title thereby and he did not acquire any title therein or thereto by reason thereof.

V. This defendant, further answering said complainant's bill, de-

nies that the said William S. T. Morton purchased the undivided half of said premises from the said Oliver P. Morton, and paid to him the full consideration thereof in the belief that by virtue of the decree of the said district court of the late Territory of Nebraska, and by virtue of the judicial proceedings had and taken by the said Oliver P. Morton as plaintiff against said Pierce and the sheriff's deed to him of the said premises, a good title was vested in him; and denies that the said James M. Woolworth purchased said premises and paid therefor to Oliver P. Morton and William S. T. Morton a consideration exceeding $1,000.00 in a like belief, and denies that he took the title of the said premises from Oliver P. Morton and the executors and executrix of the last will and testament of William S. T. Morton in the like belief, but alleges that they and each of them well knew that no title or estate in or to said premises was acquired by them or either of them.

VI. And this defendant, further answering complainant's bill, denies that in 1873 James M. Woolworth and William S. T. Morton entered into said premises, but alleges that they did not, nor did either of them, then or at any other time, enter into and take possession of said premises or any part thereof, and that neither of them ever was in the possession thereof at any time; and as to whether the said complainant has paid from 1873 to this time all the taxes which at any time have been assessed or levied upon the said premises by the city of Omaha and the county of Douglas
26 and the State of Nebraska, he has no knowledge sufficient to form a belief, and he therefore denies the same. This defendant denies that he has never paid any taxes levied or assessed thereon, but alleges that he has paid taxes levied and assessed on said premises.

VII. This defendant, further answering complainant's bill of complaint, says that it may be true that on the 2nd day of August, 1883, James M. Woolworth laid out said lands as an addition to the city of Omaha into lots, blocks, streets, and alleys, and filed a plat thereof in the registry of said county and obtained approval of the same of the city council of said city, since which time taxes, both of the said city and county, have been levied and assessed on said premises as lots, but that he has not sufficient knowledge thereof to form a belief, and he therefore denies the same; that it may be true that shortly after August 2nd, 1883, James M. Woolworth began to sell lots into which said tract may have been divided, and that he may have made sales of six or more lots, but of this he has no personal knowledge and not any sufficient knowledge to form a belief, and he therefore denies the same; that it may be true that in the years 1885 and 1886 he repurchased four of said lots from the parties to whom he may have sold and conveyed them, and that he may have paid a large consideration therefor; but of this he has no personal knowledge and not sufficient knowledge to form a belief, and he therefore denies the same; and he denies that all of the said proceedings were known to him, and denies that he made no claim to the said premises or any part thereof until about one month before the date of the filing of complainant's bill against him.

But this defendant alleges that on or about the first day of May, 1869, this defendant entered into the actual possession of all of the said premises, with the intention of occupying the same as his
27 own, and that he carried that intention into effect by the open, notorious, exclusive, adverse possession of all of said premises by him from that date until the filing of complainant's bill herein, and that he has kept and maintained a fence and fences around the greater portion thereof for more than nineteen (19) years last past and ever since said 1st day of May, 1869, and that he has used and occupied said premises as his own and adverse to the complain-nt herein and all persons whomsoever for more than nineteen (19) years last past; that he is now in the actual open, notorious, exclusive, and adverse occupancy and possession of all of said real estate, with a fence around the whole thereof and a house thereon, in which he lives with his family; and defendant further alleges that neither the complainant nor any of his grantors have ever been in the possession or occupancy of said premise- or any part thereof at any time within nineteen (19) years last past before the filing of complainant's bill or at any time or date whatever. Defendant therefore alleges that the said complainant ought not to be allowed to have or maintain his bill or action against him, because his right of action, if any he ever had, is barred by the statutes of limitations.

VIII. And this defendant, answering the ninth and tenth paragraphs of complainant's bill, denies that he has given it out to the public that he will lease parts of the said premises to any person or party who will build a house thereon and occupy the same, and denies that he has already induced any person to accept any such offers, and denies that he is exercising great diligence in securing any or other persons who will occupy parts of the said premises upon the same terms or upon any terms whatever, and denies that his object in occupying said premise- is to multiply actions, to which the complainant will be driven in order to recover possession of the said premises and establish his rights thereto. Defendant denies that in entering upon the said premises and claiming the
28 same he claims no rights except such as were derived by him from the said Glass, but alleges that he claims the said premises as his own and has so claimed the same continuously for more than nineteen years last past. Defendant denies that unless an injunction is allowed herein complainant will be subjected to a multiplicity of suits in order to recover possession of the premises from the parties to whom this defendant will lease the same, but *but* alleges that he is not trying to lease the same or any part thereof to any person or persons whomsoever.

Defe-dant denies that he, if left to himself, not only will subject complainant to numerous actions for the recovery of the possession of said premises from many parties whom he will induce to enter upon the same, and denies that he threatens to and will institute divers actions in respect of the title of the said premises unless restrained by the order and injunction of your honors, and thereby vex, harrass, and annoy the complainant, but alleges that he has

not any such intention and did not have when the complainant's bill was filed.

IX. Defendant, answering the eleventh paragraph of complainant's bill, admits that he claims that there is a radical defect in the description of the premises in the judicial proceedings instituted by and the sheriff's deed to Oliver P. Morton, because the word "east" is omitted after the words "eighty-five degrees" in the second call thereof, and admits that in the bill in equity exhibited by Oliver P. Morton in this honorable court the judges considered the sufficiency thereof, and held that said omission was not a defect, and held that, notwithstanding the same, the title passed by the said proceedings and deed to Oliver P. Morton; but defendant alleges that the said holding of the said judges was and is void, because it was obtained by the fraud practiced upon this honorable court and the said judges thereof, as hereinbe-ore alleged and stated.

29 Defendant denies that the complainant is without relief in a court of law and can only have relief in this honorable court, where matters of this and the like nature are properly cognizable, and alleges that he has a complete and adequate remedy at law, if any he ought to have.

Defendant alleges that this honorable court has no jurisdiction to entertain complainant's bill, both because complainant and defendant are citizens of the same State and district and because it is a proceeding in a court of equity in the nature *if* an ejectment bill to secure possession of real estate, and because complainant has a plain, speedy, complete, and adequate remedy at law, if any remedy he ought to have, and because he has not made such a case by his bill as is cognizable by a court of equity, and because the relief prayed in the original bill exhibited by Oliver P. Morton, to which this present bill is sought to be made supplemental, was, as declared by the judges of this honorable court in their opinion therein, "to remove a cloud on his title and not for possession."

And the defendant submits to this honorable court that all and every the matters in the said complainant's bill mentioned and complained of are matters which may be tried and determined at law, and with respect to which the said complainant is not entitled to any relief from a court of equity, and this defendant hopes he shall have the benefit of this defense, although he has heretofore demurred to the said complainant's bill.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said bill charged; without this, that there is any other matter, cause, or thing in the said complainant's said bill of complaint contained material or necessary for this defendant to make answer unto and not

30 herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained, and that the said decree heretofore rendered by this hon-

orable court against this defendant, if this court has any jurisdiction of the proceedings, be set aside and held for naught, and for such other general and equitable relief as *as* justice and equity may require.

GEORGE W. COVELL,
JNO. L. WEBSTER,
Solicitors for and Counsel for Allen Root.

STATE OF NEBRASKA, }
County of Douglas, } *ss:*

Allen Root, being first duly sworn, on his oath says that the facts stated in his above and foregoing answer are true, as he verily believes, and that he believes the matters and things stated therein on information and belief to be true.

ALLEN ROOT.

Subscribed in my presence and sworn to before me this 5th day of January, 1889.

[SEAL.] H. E. MAXWELL,
Notary Public.

Upon the back of said answer appear endorsements in words and figures following, to wit: No. 212, "M." In the United States circuit court, district of Nebraska. James M. Woolworth, plaintiff, *vs.* Allen Root, defendant. Answer of Allen Root. Filed Jan. 5, 1889. Elmer D. Frank, clerk. George W. Covell, Jno. L. Webster, solicitors for Allen Root.

Thereupon, afterwards, to wit, on the 9th day of January, 1889, replication was filed in said case; which said replication is in words and figures following, to wit:

31 In the United States Circuit Court, District of Nebraska.

The Replication of James M. Woolworth, Plaintiff, to the Answer of Allen Root, Defendant.

The repliant, saving and reserving to himself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto say- that he will aver, maintain, and prove his bill of complaint to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by the repliant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all which matters and things the repliant is now and will be ready to aver, maintain, and prove as this honorable court shall

direct, and humbly pray- as in and by the said bill he has already prayed.

J. M. WOOLWORTH,
Sol. for Comp't.

Upon the back of said replication appear endorsements in words and figures following, to wit: No. 212, M. United States circuit court, district of Nebraska. James M. Woolworth *vs.* Allen Root. Replication. Filed Jan. 9, 1889. Elmer D. Frank, clerk. J. M. Woolworth, solicitor for plaintiff.

Thereupon, afterwards, to wit, on the 29th day of June, 1889, depositions on behalf of plaintiff were filed in said case; which said depositions are in words and figures following, to wit:

32 In the Circuit Court of the United States for the District of Nebraska.

JAMES M. WOOLWORTH, Plaintiff,
vs.
ALLEN ROOT, Defendant.

Please take notice that the deposition *de bene esse* of William A. Peelle will be taken, to be read in evidence at the trial of said cause on the part of the plaintiff thereof, before competent authority, at the office of Perry J. Freeman, at 501 Main street, in the city of Richmond, Indiana, commencing on the 29th day of June, 1889, at the hour of ten o'clock in the forenoon of said day, with authority to adjourn from day to day till all such depositions shall have been completed, at which time and place you are hereby notified to be present and put interrogatories to the said witness if you shall think fit.

The reason for taking the deposition is that said witness lives at a greater distance than one hundred miles from Omaha, Nebraska, the place of trial of this action.

Dated Omaha this 24th day of June, 1889.

J. M. WOOLWORTH,
Sol. for Pl'ff.

To Messes. Covell & Webster, sol's for def't.

Endorsed: United States circuit court, district of Nebraska. James M. Woolworth *vs.* Allen Root. Notice to take depositions *de bene esse*. J. M. Woolworth, attorney for pl'ff. Service of within notice admitted the 24th day of June, 1889. G. W. Covell, of counsel for Allen Root.

33 Deposition of William A. Peele, a witness produced, cautioned, and sworn on behalf of the plaintiff in a certain suit in equity depending in the United States circuit court in the district of Nebraska between James M. Woolworth, plaintiff, and Allen Root, defendant, under the notice hereto annexed, which deposition is to be read upon the final hearing of said cause.

At Richmond, in the State of Indiana, on the 29th day of June, 1889, at 10 o'clock in the forenoon, WILLIAM A. PEELLE, to me personally known, appeared before me and then and there was by me duly examined, cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth in the cause above entitled, — testified as follows:

Present: The defendant, Allen Root, and his attorney, Jonathan W. Newman.

First interrogatory. What is your name, occupation, and place of residence?

Answer 1. My name is William A. Peelle; I am an attorney-at-law and have been for forty-four years; I reside in the city of Richmond, Wayne county, and State of Indiana.

Second interrogatory. Did you know William S. T. Morton in his lifetime and do you know whether he is deceased? If you do, state when and where he died.

Answer 2. I knew William S. T. Morton well in his lifetime and know he died in the month of April, 1875, in Wayne county, Indiana. I was present at his death.

Third interrogatory. State whether or not the said Morton died leaving a will; and, if so, who were the executors thereof?

(Objection by def't on ground that will itself best evidence.)

Answer 3. William S. T. Morton died leaving a will. I prepared or wrote it for him. He left, as provided in said will,
34 his wife, Eliza M. Morton, executrix, Thomas McCullough and William A. Peelle executors.

Fourth interrogatory. What, if any, connection had you with the business of settling the estate of said Morton?

Answer 4. I have done almost the entire business of settling the estate.

Fifth interrogatory. State, with reference to the solvency or insolvency of his estate, what was the condition thereof.

Fifth interrogatory objected to on the ground that it is immaterial and irrelevant.

Answer 5. The estate is hopelessly insolvent; does not pay more than thirty-five (35) per cent. on the claims against it.

Sixth interrogatory. State whether or not the said Morton died seized of the undivided half of the lots situate in Douglas county, Nebraska, known and described as follows: Beginning at the northwest corner of section twenty-eight (28), in township fifteen (15)

north, of range thirteen (13) east, of t-e sixth (6) principal meridian, and running thence south eight (8) chains and five (5) links; thence south eighty-five (85) degrees east twenty (20) chains and ten (10) links; thence north nine (9) chains and seventy (70) links, and thence west twenty (20) chains to the place of beginning, containing seventeen and seventy-five hundredths ($17\frac{75}{100}$) acres. If so, state whether or not the same were sold and conveyed by the executors of the last will and testament of the said Morton. If so, for what sum and to whom?

Objected to on the ground that the question calls for the opinion of the witness and that the real estate described in the question is not the same described in the bill. Objection to second part of question that the deed of conveyance is better evidence and as calling for parol evidence of the contents of a written instrument.

35 Answer 6. Said Morton died seized of the above-described land, as shown by the deed in his possession at his death. The same was sold and conveyed to James M. Woolworth in June, 1879, for the sum of four hundred and forty-three dollars and seventy-five cents ($443.75).

Seventh interrogatory. State whether or not the said sum of $443.75 came to your hands as one of the executors of the said last will and testament of said Morton and what was done with the same.

Objected to on ground that it is leading and immaterial.

Answer 7. That said sum of $443.75 was paid to me by said James M. Woolworth for said interest in said land as one of the executors of said last will and testament of said William S. T. Morton. The said sum was applied in the payment of the debts of the estate of said Morton.

Eighth interrogatory. State whether or not Mrs. Eliza M. Morton is still the executrix of the said last will and testament, and, if you answer that she is not, state when she ceased to be such executrix, and also for what reason she ceased to be such executrix.

Objected to as being immaterial and irrelevant.

Answer 8. Mrs. Eliza M. Morton, the executrix of said estate as named in the will, was a resident of Wayne county, Indiana, when appointed as such executrix, and remained in said county until about two years ago, when she removed from the State and went to some point not known exactly in the State of Ohio, whereby, under section 2240 of the Revised Statutes of Indiana, she ceased to be executrix.

Ninth interrogatory. State if you know whether or not any of the heirs of the said Morton or any of the legatees mentioned in his said will have ever made claims to or alleged any interest in the above-described premises. If you answer that they have
36 not, to your knowledge, state whether or not you would be likely to know of the fact and the reason for stating that you would be informed thereof.

Objected to on the ground that it is immaterial and irrelevant.

Answer 9. None of the heirs or legatees of said Morton as mentioned in said will have ever made a claim to or alleged any interest in the above-described premises, to my knowledge. If they or any one of them had I think I would have been informed of it.

Last interrogatory. Do you know or can you set forth any other matter or thing which may be a benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of this your examination or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

Last answer. I know of nothing else material to either party to this suit.

Cross-examination by JONATHAN W. NEWMAN, Esq., of counsel for defendant:

Cross-interrogatory first. Have you the deeds in your possession for the lands described in the sixth interrogatory, of which you say said William S. T. Morton was seized; if not, do you know where they are?

Answer. If I have such a deed I can't find it. My best opinion is that it is in the hands of Thomas McCullough or James M. Woolworth.

Cross-interrogatory second. Have you a distinct recollection of having read said deed; and, if so, when?

Answer. My recollection is not distinct on this point. It has been a long time ago. I have not seen that deed for ten years, to the best of my recollection. I judge of the correctness of the description from the deed made to Woolworth. I have no other recollection than this.

WILLIAM A. PEELLE.

37 STATE OF INDIANA, } ss:
County of Wayne, }

I, Perry J. Freeman, a notary public in and for said county and State, do hereby certify that at ten o'clock in the forenoon of the 29th day of June, 1889, at my office, number 501 Main street, in the city of Richmond, in said county and State, William A. Peelle, to me personally known, duly appeared before me and was by me first duly examined, cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth in a certain suit in equity depending in the United States circuit court for the district of Nebraska between James M. Woolworth and Allen Root, and that thereupon the interrogatories heretofore set forth were by me propounded to him, and to each of them thereof he gave answer as hereinbefore set forth; that his said deposition was given and subscribed by him in my presence and reduced to writing by me in his presence at the time and place aforesaid, and that the foregoing is a true and correct statement of his said deposition and all thereof so by him then and there given.

Witness my hand and notarial seal this 29th day of June, 1889.
[SEAL.] PERRY J. FREEMAN,
Notary Public.

Notarial fees	$3 00
Witness fees	1 25
Total	$4 25

The above fees are paid in full by the plaintiff.
PERRY J. FREEMAN,
Notary Public.

Upon the back of said deposition appear endorsements in words and figures following, to wit: No. 212, M. Rec'd June 29, '89, and opened by order of court Nov. 14, '89. E. D. Frank, clerk.

Thereupon, afterwards, to wit, on the 30th day of July, 1889, deposition on behalf of plaintiff was received and filed November 14, 1889; which said deposition is in words and figures following, to wit:

38 In the Circuit Court of the United States within and for the State and District of Nebraska.

JAMES M. WOOLWORTH, Complainant,
vs.
ALLEN ROOT, Defendant. } Depcsition for Complainant.

Deposition of a witness taken before me, Wallace R. White, a notary public within and for the county of Weber and Territory of Utah, on the twenty-sixth day of July, in the year 1889, between the hours of ten o'clock a. m. and four o'clock p. m., at the office of the probate judge of said county, in Ogden city, in the said county of Weber, pursuant to the annexed notice, to be read in evidence in behalf of the complainant in an action pending in the United States circuit court within and for the State and district of Nebraska, in which James M. Woolworth is complainant and Allen Root defendant.

At the taking of said deposition there was present on behalf of the complainant Charles Offutt and on behalf of the defendant there was present H. W. Smith, att'y for defendant, and the defendant, Allen Root, in person.

ISAAC N. PIERCE, of lawful age, being by me first duly examined, cautioned, and solemnly sworn, as hereinafter certified, deposeth and sayeth as follows, viz:

39 By CHARLES OFFUTT, attorney for complainant.

Q. State your name, age, residence, and occupation.

A. My name is Isaac N. Pierce; age, 43; I am a resident of Ogden, Utah; I am a real-estate broker.

Q. Did you ever at any time live in the State of Nebraska?

A. Yes, sir.

Q. State during what time you so resided in that State, and at what points therein.

A. I first came to Nebraska in September, 1869. I lived in Douglas county until 1875. I then removed to Saunders county. I lived there until February, 1878, and then returned to Omaha. I lived in Omaha from February, 1878, to December, 1887.

Q. Have you lived in Omaha since the 31st day of December, 1887?

A. No, sir.

Q. How long have you resided in your present place of residence?

A. Twelve months—nearly thirteen.

Q. At what point in Douglas county did you live during the period that you were first there, as indicated in the previous answer?

A. I lived at Waterloo.

Q. What was your occupation during the time that you last lived in the city of Omaha—I mean during the time that you lived in the city of Omaha?

A. I was employed by Dewey & Stone, and then went to the county poor farm. I was superintendent of Douglas county
40 poor farm. I was there about six years.

Q. During the time that you were superintendent of the Douglas county poor farm and holding that office where did you reside?

A. On the county farm.

Q. Do you know the defendant, Allen Root?

A. I do.

Q. How long have you known him?

A. About fifteen years.

Q. What was the nature of your acquaintance with him—as to whether it was intimate or otherwise?

A. For the first year—let me see; about 1873—we were brought together several times in official capacities. After that I lost track of him. There was seven or eight years that I didn't know where he lived. I knew he was a resident of Douglas county.

Q. Do you know whether or not there was any interchange of visits with your family and his during any time you were acquainted with him?

A. I think there was; I think my wife used to visit there.

Q. During what time?

A. During the period of superintendency of the farm—between 1878 and 1884.

Q. What was the nature of your acquaintance in the immediate neighborhood of the locality in which you lived from 1878 to 1884—as to whether it was general, extensive, or otherwise?

A. It was general; our acquaintance was general.

41 Q. The question was directed to the people in the neighborhood.

A. Oh, I thought it was in regard to Mr. Root. Well, that answer will do.

Q. Did you during that time or at any time know of the property in Omaha now known as Oakhurst addition and containing about seventeen acres of land, bounded on the west by the poor farm, on the south by Poppleton avenue, on the east by Grove street, and on the north by what is now Pacific and then was Mount Pleasant street?

A. I knew the property; yes, sir.

Q. How long have you known that property?

A. For the last—well, since 1878.

Q. What opportunities had you—how often did you see the property named during the time since you have known it first?

A. Well, from 1878 to 1884 I saw the property in question very nearly every day. It was right in front of us or nearly in front.

Q. Did you ever pass by the property?

A. Yes, sir.

Q. How often?

A. That I could not approximate; probably every day.

Q. Did you ever live on the property?

A. No, sir.

Q. Did you ever at any time rent that property?

A. No, sir.

Q. Did you ever at any time have any arrangement with the defendant, Allen Root, or any other person for the occupation
42 or use by you of this property or any part thereof?

A. No, sir.

Q. Did you know any one by the name of W. R. Pierce while you lived in Omaha?

A. No, sir.

Q. In that neighborhood or any other place?

A. No, sir.

Q. Did you know any person by the name of J. N. Pierce while you lived in that neighborhood or at any other point in Douglas county?

A. No, sir.

Q. Did you ever at any time know any one by the name of Cyrus R. Pierce living in that neighborhood or any other portion of Douglas county?

—. No, sir.

Q. During the time that you have known this property state whether or not any person lived on the property.

A. I think there was some parties living on the property or in the street—what is now the street.

Q. When was this—at what time?

A. It was about 1883.

Q. What portion of the locality with reference to the property in question that you was speaking of could this be?

A. It was near the corner of Poppleton avenue and Grove street, if Grove street was the east boundary. I am not familiar with the names of those streets.

Q. Well, were they located in the street or upon the property?

Mr. Smith objects to the form of this question as being
43 leading.

A. That I could not state.

Q. Well, upon which boundary of the land did you speak of these parties being located?

A. It would be the southeast corner—very near the corner.

Q. Could you say whether they were on the land or not?

A. No; I could not say whether they were on the land or whether they were in the street.

Q. How is it that you are enabled to remember the fact that any persons were in or about the locality named?

A. I was walking along the street—Poppleton avenue—one morning, going to the city, and the parties asked me if I knew who owned the land.

Mr. Smith objects to witness stating what was said by any other parties than parties to the suit.

WITNESS (continuing): They stopped me as I was going along and asked me whose land it was. I said, "Mr. Woolworth's." They asked if I thought he would have any objection to their living upon it. I told them I had no means of knowing; that they had better see Mr. Woolworth.

Mr. Smith moves to strike out all of the foregoing answer to this question so far as it embraces the statements of the witness to other parties in relation to the ownership of the land and the questions asked him by other parties.

Q. What time was this that you had this interview with the parties named in your last answer?

A. It must have been in 1883 or 1884; probably it was 1884; it was the last summer I was at the farm.

44 Q. Who were these parties, if you can state their names? And if you cannot state their names state what kind of people they were.

A. I did not know their names. If I remember rightly, I think they were working on the grade somewhere—contractors.

Q. Well, what were they? Were they known commonly by any name? If so, state what.

A. I never knew the names of the parties.

Q. What kind of protection or house, if they had one, were they occupying?

A. I think they had a one-roomed house; just boarded up—a skeleton.

Q. Do you know or not whether the property hereinbefore described was generally known as belonging to any particular person in that neighborhood during the time you were there?

A. Yes.

Q. To what person?

Mr. Smith objects to this question as calling for incompetent testimony.

Q. To what person was it generally known and reputed to belong?

A. Well, I understood that it belonged to J. M. Woolworth.

Mr. Smith moves to strike out the answer as not being responsive to the question.

WITNESS (continuing): The answer I gave was that it was known and supposed to be owned by Mr. Woolworth. I had no means of knowing, only by what I heard others say.

Mr. Smith moves to strike out the answer as incompetent.

45 Q. Do you know whether any person by the name of Aiken lived near that property?

A. I remember; yes, sir.

Q. Where did he live with reference to this property?

A. I am not prepared to say with any certainty to where Mr. Aiken did live. I know the immediate vicinity, but I never was at his place. I would say that it was probably forty rods from where I lived to where Mr. Aiken's place was.

Q. Can you state upon what addition or near what locality Aiken lived, and during what year?

A. Well, he lived near the addition of Oakhurst. I would not be positive whether he was on this land in question or whether he was on another piece of property south.

Q. What was the addition south of this property known as?

A. It was Griffin's and Smith's; to the best of my knowledge it was Griffin's & Smith's addition.

Q. Well, do you know who were the owners of the property south of it?

A. No, I do not.

Q. Do you know who claimed it?

A. I think Theodore Galligher claimed it—that is, he claimed part of it. He claimed sixty-odd acres in there.

Q. Where did you say Aiken's house was with reference to yours?

A. It was north of east.

Q. And about how far?

A. I should think forty rods.

Q. Did any fence, or other thing, intervene between your

46 house and Aiken's?

A. Yes, sir.

Q. What did intervene?

A. Well, a fence and a crop of corn during the one season that Aiken was there, or part of a season.

Q. Was it more north than east, or *vice versa?* Give us the cardinal direction as near as you can, in other words.

A. If I remember rightly, it was very nearly northeast.

Q. Do you know when Aiken went there?

A. No; I do not remember the month, nor the year.

Q. Do you know how long he staid there?

A. No; I do not. I am inclined to think he was there during the farming season.

Q. Of what year?

A. That I could not say.

Q. Then he didn't stay there longer than the one season?

A. No, I think not.

Q. And what is your best recollection as to what season that was?

A. To the best of my recollection it would be 1881. It might have been 1882. To the best of my knowledge it was 1881.

Q. What was Aiken's occupation?

A. I don't know of any but that of farmer.

Cross-examination by H. W. SMITH, attorney for Allen Root, the defendant:

Q. If I understand you, the poor farm is immediately west of Oakhurst?

47 A. Yes, sir; a part of the poor farm.

Q. Was there a street between Oakhurst and the poor farm?

A. Yes, sir.

Q. What was the name of that street?

A. 36th street.

Q. And Poppleton avenue was on the south of Oakhurst?

A. Yes, sir.

Q. Did it also extend on the south of the poor farm?

A. Yes, sir.

Q. How far from the corner of Poppleton avenue and 36th street was the poor-house situated?

A. About twenty rods.

Q. In what direction?

A. I should say about one hundred feet east of north.

Q. From the corner?

A. Yes, sir; the corner would be probably one hundred feet east of north. Probably the poor farm would be twenty rods, to the best of my knowledge, south of the corner of 36th street and Poppleton avenue.

Q. It extended twenty rods south of the corner of 36th street and Poppleton avenue?

A. Yes, sir; the corner of Poppleton avenue and 36th street would be probably two hundred feet east of the poor-house.

Q. And how far south of it?

A. I should say about twenty rods.

Q. Twenty rods south?

A. Yes, sir.

48 Q. Then the poor-house was situated twenty rods north of Poppleton avenue?

A. South.

Q. South from Poppleton avenue? Did I not understand you to say that Poppleton avenue ran on the south of the poor farm?

A. No, sir.

Q. On which side does it run?
A. Well, it now cuts through the extension of it.
Q. And the poor-house was south of Poppleton avenue?
A. Yes, sir.
Q. Then Oakhurst lay practically in a northeast direction from the poor-house itself?
A. Yes, sir.
Q. Was that land cultivated at any time that you lived there?
A. I never knew of it being cultivated.
Q. Was it woodland or field?
A. It was woodland.
Q. You say that Mr. Aiken lived in that vicinity in 1881 or 1882?
A. Yes, sir.
Q. How far north from Poppleton avenue did Oakhurst extend?
A. It joined Poppleton avenue.
Q. How far did it extend north from it? What would be the length of the north and south line?
A. I do not know that I could approximate—about 20 rods.
49 Q. And what was its extent east and west along Poppleton avenue?
A. Eighty rods, I think it would be, about.
Q. How many acres, in your judgment, were embraced in it?
A. Well, I could not say only what I heard.
Q. I want your opinion as to how much land there was there.
A. I should say between fifteen and twenty acres.
Q. You are positive that it was eighty rods from east to west?
A. Well, to the best of my knowledge it was eighty rods; I am just judging.
Q. Can you tell by the number of blocks?
A. No, I could not; I do not know the width of the blocks.
Q. You speak of certain parties living there in 1883 and 1884; you say that they probably lived in the street. Can you tell us what street they lived in?
A. Well, if they lived in the street they lived in Poppleton avenue, though I would not be positive whether they lived in the street or south of it.
Q. If they lived south of the street they would be off of Oakhurst addition, wouldn't they?
A. Yes, sir.
Q. Was Poppleton avenue or the land which it covers taken from Oakhurst?

This question is objected to by Mr. Offutt as immaterial,
50 irrelevant, incompetent, and as not being the best evidence, as the records would show the fact.

A. I think all of it was taken from Oakhurst.
Q. If they lived in the street, then, they lived on this land?
A. Yes, sir.
Q. You say that you left Douglas county in 1874, I believe, and went to Saunders county?

A. I went in 1875.

Q. Where did you live from 1870 to 1875?

A. I lived in Douglas county near Waterloo, on the farm.

Q. What distance would that be from the land in controversy?

A. About twenty miles.

Q. You had no knowledge at that time of this land or the occupancy by any person of it?

A. No, sir.

Q. Your first acquaintance, then, with this land began in 1878?

A. Yes, sir.

Q. Was your attention ever particularly directed to it until the time you speak of, when you saw parties there in 1883 or 1884?

A. Yes; it was directed to it as soon as I went there, because it was very nice woodland, good pasturage, and I became familiar with it, as our cows used to break out of the enclosure of the poor farm and get over into that pasture.

Q. That was not enclosed, as I understand you?

A. No, sir.

51 Q. Were there any buildings on this land at the time you left there other than the Aiken house?

This question is objected to by Mr. Offutt as presuming the fact, which is not in evidence, that the Aiken house was on the land.

Q. Were there any buildings besides the Aiken house?

A. Yes, sir.

Q. Describe them.

A. I think there were two small what we call shanties.

Q. Board houses?

A. Board houses; yes, sir.

Q. On what portion of the land were they situated?

A. They were on the southeast corner, I think, of Oakhurst.

Q. That would be near the corner of Poppleton avenue and Grove street?

A. Yes, sir.

Q. Do you remember a stable that was used in connection with the Aiken place?

A. Yes, sir.

Q. Is there any doubt in your mind as to which land it was situated upon?

A. No, sir.

Q. On what land was it situated?

A. It was on Oakhurst.

Redirect examination by Mr. OFFUTT, attorney for complainant:

Q. On what portion of Oakhurst was this stable to which you refer, and what kind of a stable was it?

52 A. It was some of the forks of a tree and poles laid across and a frame-work and covered with brush and straw. It was on the south side of Oakhurst.

Q. How near Poppleton avenue?
A. Well, it was, I should say, within twenty feet.
Q. Where was the Aiken house from that stable—in what direction?
A. South.
Q. About how far south?
A. That I could not tell—just the number of feet.
Q. In answer to a question on cross-examination you spoke of two little frame or board houses being on the southeast corner of this addition, or at the intersection of Grove street and Poppleton avenue. Are not these houses that you refer to the houses in which those graders were?
A. Yes, sir.
Q. Are they the same ones that you referred to in your direct examination as thinking they were in the street?
A. Yes, sir; they were the same parties.
Q. In your direct examination you stated that when you came to Omaha in 1878 you were employed a part of the time by Dewey & Stone, and after that you went to the poor farm. I want you to fix the date, as near as you can, that you went to the poor farm.
A. I went there August 4, 1878.
Q. Now, regarding the house that Mr. Aiken lived in—do you know when that house was built, and by whom it was built?
A. No; I do not.
53 Q. How long was it built before he went into it?
A. He built it or had it built and moved into it.
Q. Was any house there before he lived there?
A. No, sir.
Q. Who lived in the house, if any one, after he left it?
A. Mr. Galligher took the house—bought it, I believe.
Q. What Galligher?
A. Theodore Galligher, to the best of my recollection.
Q. Did any one live in it afterwards?
A. No, sir.
Q. How long had these houses been located where you say these graders were living—been located where you saw them—before the occasion upon which you saw them there?
A. I could not say.
Q. Could they have been there very long—did you ever see the houses before then?
A. Yes; I had seen them before.
Q. How long before?
A. I do not remember.
Q. What kind of a house was the Aiken house?
A. A board house. It was boarded perpendicular and covered with tar paper.
Q. Large or small?
A. A small house.
Q. Could you state the number of rooms?
A. No, sir.

Recross-examination by H. W. SMITH, attorney for defendant:

Q. When you were superintendent of the poor farm at
54 what building on that farm did you reside?

A. It was at the poor-house.

Q. As I understand you, the Aiken house was about forty rods northeast of the poor-house?

A. Yes, sir.

And further deponent sayeth not.

ISAAC N. PIERCE.

Fees of notary public, 34 folios & certf.	$5 90
To court stenographer & copyist	10 00
Total	$15 90

Paid by pl'ff.

TERRITORY OF UTAH, } ss:
County of Weber, }

I, Wallace R. White, a notary public within and for the county and Territory aforesaid, do hereby certify that Isaac N. Pierce was by me first duly sworn to testify the whole truth and nothing but the truth, and that the deposition by him subscribed as above set forth was reduced to writing by Daniel Hamer, who is not interested in the suit, in my presence and in the presence of the witness respectively, and was subscribed by said witness in my presence, and was taken at the time and place in the annexed notice specified; that I am not counsel, attorney, or relative of either party or otherwise interested in the event of this suit, and such deposition was commenced at the time in said notice specified and completed on the day on which it was begun and before the hour of four o'clock p. m.

Given under my hand and official seal this 26th day of July, 1889, in the city of Ogden, county of Weber and Territory of Utah.

WALLACE R. WHITE. [SEAL.]
Notary Public for Weber County, Utah Territory.

55 Upon the back of said deposition appear endorsements in words and figures following, to wit: No. 212, M. Rec'd July 30, 1889, and opened by order of court Nov. 14, 1889. E. D. Frank, clerk.

Thereupon, afterwards, to wit, at the May adjourned term of said court, on the 18th day of October, 1889, the following proceedings were had and done in said cause, as appears of record on folio 655, Journal "N" of said court, to wit:

At Chambers, Oct. 18th, 1889.

JAMES M. WOOLWORTH
vs.
ALLEN ROOT.

On motion of George W. Covell, solicitor for the respondent herein, it is ordered by the court that the time to complete testimony herein be extended to November 11th, 1889.

Thereupon, afterwards, to wit, on the 9th day of November, 1889, deposition on behalf of plaintiff was received and opened by order of court Nov. 14, '89; which said deposition is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

JAMES M. WOOLWORTH, Complainant,
vs.
ALLEN ROOT, Defendant. } 212 M. Chancery.

Testimony taken before Chas. A. Potter, examiner in chancery of said court, Saturday, the 9th day of November, A. D. 1889.

Present: James M. Woolworth, sol. for complainant; John L. Webster, sol. for respo't.

BYRON REED, a witness on behalf of the complainant, being first duly cautioned and sworn, *was* examined in chief by Mr. WOOLWORTH, deposes and says as follows:

55½ In the Circuit Court of the United States, District of Nebraska.

JAMES M. WOOLWORTH, Complainant,
vs.
ALLEN ROOT, Respondent. } In Equity. 212 M.

DEAR SIR: You will please take notice that the above-named complainant desires the evidence to be adduced in said case to be taken orally, under the sixty-seventh rule in equity of the Supreme Court as amended.

You will further take notice that by an order made in said cause by Chas. A. Potter, examiner in chancery of said court, the examination of witnesses on the part of said complainant will take place before said examiner, at his office, room 710 New York Life building, Omaha, Nebraska, on the 9th day of November, 1889, at 2 o'clock p. m., and proceed as the said examiner may direct, adjourning from day to day, if necessary.

JAMES M. WOOLWORTH,
Solicitor for Complainant.

To Geo. W. Covell, solicitor for respondent.

Ordered that the testimony of witnesses for complainant in foregoing cause mentioned may be taken before me, at the place therein stated, on the 9th day of November, 1889, at 2 o'clock p. m., such examination to proceed until completed unless adjourned for cause.

It is further ordered that solicitors for respondent have one day's notice of examination.

C. A. POTTER,
Examiner in Chancery.

Attached to said notice is the return of the marshal, in words and figures following, to wit:

DISTRICT OF NEBRASKA, *ss.*:

I hereby certify and return that on the 7th day of November, 1889, I received this notice, and on the 7th day of November, 1889, I served the same on the within-named defendant, Allen Root, in Douglas county, State and district of Nebraska, by leaving an original thereof, with all the endorsements thereon, at the usual place of abode of the said defendant, with an adult person and resident in the family of said defendant.

BRAD. S. SLAUGHTER,
United States Marshal for the District of Nebraska,
By C. W. LYON,
Deputy United States Marshal.

Endorsed: No. 212, docket M. James M. Woolworth *vs.* Allen Root. Notice of oral examination of witnesses and order on behalf of —. I accept service of this notice this — day of November, 1889, —— ——, solicitor for respondent.

Marshal's Costs.

Service	$2 00
Mileage—car-fare	10
Total	$2 10

56 BYRON REED, of lawful age, being by me first duly examined, cautioned, and solemnly sworn, as hereinafter certified, examined in chief by Mr. WOOLWORTH, testified as follows:

Q. In 1873 and 1874 were you the agent for the lot on which the Ramge building is now built in this city?

A. I was.

Q. In those years did you rent any part of that lot to a man named Pierce?

A. No, sir.

Q. Did you rent it to any other person?

A. Yes; I did.

Q. State who to.

A. I rented it to a man named C. W. Prince.

Q. A part of that lot?
A. Yes; in 1873 and 1874.

Cross-examined by Mr. WEBSTER:

Q. Was that by written lease?
A. Yes, sir.
Q. And of record?
A. I do not know whether it was recorded or not.
Q. Have you the lease?
A. I have not been able to find it. I have looked for it, but did not find it and do not think I have it, but I have got a record of the transaction on the books of my office.
Q. What you are stating now, is it from what the books disclose?
A. I state it from the books that I kept at that time.

57 Q. You have referred to the books prior to the giving of this testimony?
A. I examined the books; yes, sir.
Q. Was that renting to Prince of the entire lot?
A. No; one-third of the lot.
Q. How was the remainder of the lot occupied—used—during that period of time?
A. The remainder of the lot was almost covered with buildings—with a house.
Q. Who occupied the house?
A. There were three or four tenants in the house—different ones. I do not recollect and did not look to see who occupied the house.

The signature of this witness to this deposition is waived by both parties.

58 JAMES M. WOOLWORTH, recalled on behalf of the plaintiff, examined, testified as follows:

I never had any conversation with John H. Sahler about this suit or about the lands in controversy in it nor authorized any other person to speak to him about it or to get him to do anything in connection with this suit or with the land or with Mr. Gallagher or any other party.

The cross-examination of this witness is waived.
The signature of this witness to this deposition is waived by both parties.

Certificate.

UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

I, Charles A. Potter, examiner in chancery, duly appointed by the circuit court of the United States for the district of Nebraska, in the eighth circuit, do hereby certify that — the day named in the deposition hereto annexed I was attended at my office named in

this annexed notice, in the city of Omaha, by the counsel and witness- aforesaid; that the said witnesses were duly sworn and examined and the depositions were reduced to writing. The reading of said depositions to the witness- and their signing the same was waived by all parties.

Dated Nov. 9th, 1889.

C. A. POTTER,
Examiner in Chancery.

Fees.

Depositions, 15 folios, at 20 cents per folio	$3 00
Swearing two witnesses, at 10 cents	20
Certificate	25
Paid by pl'ff.	$3 55
Marshal's fees	$2 10

59 Upon the back of said depositions appear endorsements in words and figures following, to wit: No. 212, "M." Rec'd Nov. 9, '89, and opened by order of court Nov. 14, '89. E. D. Frank, clerk.

Thereupon, afterwards, to wit, on the 13th day of November, 1889, depositions were received in said case, and on the 14th day of November, 1889, opened by order of court; which said depositions are in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

JAMES M. WOOLWORTH, Complainant,
vs.
ALLEN ROOT, Defendant.

Testimony taken before Chas. A. Potter, examiner in chancery of said court, ——day, the — day of ——, A. D. 188–.

Present: James M. Woolworth, sol. for complainant; Geo. W. Covell, sol. for def't.

ALLEN ROOT, a witness on behalf of the respondent, being first duly cautioned and sworn, *was* examined in chief by Mr. COVELL, deposes and says as follows:

Int. 1. Please state your name, age, residence, and occupation.

60 A. Allen Root; 63 years of age; live on 35th and Poppleton avenue, Omaha, Nebraska; am the defendant in this action.

Q. Do you know the premises in controversy?

A. I do.

Q. Can you describe them by metes and bounds? And, if so, give them.

A. They lie in the north end of the west half of the northwest quarter of section 28, fifteen, thirteen.

Q. You may state whether or not you have a deed for the premises in controversy; and, if so, from whom?

A. I have a full warranty deed from Herman Glass, given some time in December, 1864.

Q. Where is the original deed?

A. I do not know.

Q. Where was it the last time it was seen by you?

A. When I handed it in to the recorder some time in the year 1866.

Q. Recorder of what?

A. Deeds for Douglas county.

Q. Have you had search made for it and made search for the original?

A. Yes, I have.

Q. What has been the result?

A. I did not find the deed.

Q. Have you a certified copy of the record of that deed—that is, a copy of that deed?

A. I have a certified copy.

61 The copy of the deed referred to is produced and offered in evidence by the defendants, being a copy from the recorder's office of Douglas county, Nebraska. The copy of the deed is offered for the purpose of showing title and color of title in the defendant, Allen Root, to the premises in controversy. Same is hereto attached, marked Exhibit "A."

Q. You may state what you did under the deed for the premises in controversy which you have mentioned in your previous testimony from Herman Glass to you.

Objected to as immaterial and irrelevant.

A. I entered into the possession of the premises in 1865 by entering upon it and cutting my winter wood during that winter and spring, and also the next winter and spring. During the year 1867 I commenced to fence and fenced about one-half of it. In 1869 I used that so fenced as a pasture. In 1869 I commenced to grub and clear the part that was not fenced; I cleared and grubbed about two acres or two and a half during the years 1870 and 1871, and planted some potatoes upon it that year.

Q. Where did this fence run and how much of the premises in controversy did they enclose that you have mentioned?

A. They enclosed about one-half of it on the east half.

Q. State on what lines the fences were built and the character of the fence.

A. The fences through the timber was a brush fence or what we call in a timbered country a slash fence—that is, trees fell in a line so as to stop cattle and horses; this fence went around three sides, with the exception of about one-half of the east side, which was a post-and-board fence; the posts I cut off from the land and
62 the boards were of cotton-wood, part old and part new when they were built.

Q. What was the character of the fence on the south line of that part of the premises which were enclosed?

A. It was a brush fence.

Q. How far west did it extend from the southeast corner of the premises in controversy?

A. Nearly half way across the eighty.

Q. Where did it then extend from that corner?

A. North across the tract, clear to the line.

Q. What was the character of that fence that extended from the southwest and run north, extending across the tract of land to the north line?

A. A brush or slash fence.

Q. Do you mean from the southwest corner of the whole premises?

A. No; from the northwest corner of the part fenced, then go north.

Q. You mean from the southwest corner of the part fenced, then go north, do you not?

A. Yes; that is, from what is now Poppleton avenue going to Pacific street, as it is now.

Q. That fence run to the north line of the tract?

A. Yes; or what is now Pacific street.

Q. Was there a fence on the north line of the tract running east from this brush fence you have just described; and, if so, what kind of a fence, and to what point did that extend?

63 A. It was the same kind of a fence, a brush fence from the northwest corner of that which was fenced to the east line of the tract; there was a brush or slash fence about half way across.

Q. Running from what point to what point?

A. From the northeast corner, running south.

Q. What was there, what kind of a fence, from the point where this brush or slash fence ceased to the southeast corner of the part fenced?

A. A post-and-board fence.

Q. Who built this fence you have described?

A. I and my boys.

Q. In what year?

A. Commenced in the year 1886.

Q. Do you mean 1886?

A. No; 1866.

Q. And when were they finished?

A. They were finished in 1868.

Q. How much of the tract in controversy was there left unenclosed and unfenced?

A. About one-half of it.

Q. Which half?

A. The west half.

Q. You may state what you did with respect to the part that was unfenced, that west half of the tract, or nearly the west half of the tract.

A. I said I believed in 1869 I commenced to clear, and grubbed about two and a half acres in 1870 and 1871. I had it completely cleared out and planted potatoes the last year.

Q. You may state what other acts of ownership you — over
64 that part of the land fenced than those you have named.

Q. At all times up to 1873 I went on there and cut wood and posts and used it in every way as I would any other piece of land that I owned and did any other piece of land that I owned.

Q. From what part of the land did you cut wood and posts and timber off during those years, if any?

A. I cut from both sides, both inside the fence and outside the fence of this land.

Q. In what way, then, other than that which you have already stated, did you use the land that was fenced, as well as the land that was unfenced?

A. In 1875 I had a family living on it from that time continuously up to the present time.

Q. You may state on what part of the premises the family you have mentioned were living.

A. Near the part that I have cleared up.

Q. Was that inside or outside of the enclosure?

A. Outside.

Q. You may state what other acts or ownership, such as having parties live upon the premises or any part thereof, whether inclosed or uninclosed, than such as you have already mentioned you have done.

A. I had a family living there till 1887 continuously.

Q. That, you say, was upon that part unfenced. Now, if anybody lived on the part fenced I want to know it.

A. A part of the time.

65 Q. You may state whether, during the years intervening between 1866 and 1888, you occupied this land yourself personally; and, if so, in what way.

A. I used the ground to stop on whenever I wanted to come in town. I generally wanted to go home; if I didn't want to go home for any purpose I stopped there, and sometimes staid all night, and when I would bring in a load and could not sell it and did not want to take it home and the weather was such as I could I stayed there all night.

Q. You may state whether or not during those years, or most all of them, you cut timber off from that land.

A. I believe every year I cut both *both* posts and wood and poles.

Q. From what portion or portions of the tract in controversy did you do this, on that which was fenced or unfenced?

A. Both of them.

Q. Up to what time from the date when the fences you have mentioned were finished was the land which you have stated was enclosed thereby still enclosed by the fence or fences you have mentioned?

A. Up to about 1879 or 1880.

Q. What then occurred as to the fence around the tract?

A. They came down; I did not use them much after 1876.

Q. Do you mean 1866 or 1886?

A. I meant 1876; I did not use them much as a fence after 1876; they *be*come down; the brush fence became nearly dilapidated.

Q. You may state whether or not the tract is fenced at the present time.

66 A. It is.

Q. Who fenced it?

A. I did.

Q. With what?

A. Posts and wire fence; and built a small house on it in the spring of 1888.

Q. State whether or not any other person than yourself or those occupying the premises in your interests were in actual possession of the premises during any of the years from 1866 up to 1889.

A. There has not been any one to my knowledge and no one claimed possession to my knowledge.

Q. During what years was it that you used the enclosed part for pasture?

A. From 1868 until about 1876 or 1877.

Q. In what way was it used by you from 1877 to 1888?

A. By going on it and taking whatever I desired to in the shape of timber or wood and staying there when I wanted to stay at any and all times.

Q. Was this done upon the part enclosed as well as the part unenclosed?

A. Mostly upon the part unenclosed; that would be from the west side.

Q. When did you begin living upon the land, if at all, personally, you and your family?

A. In the spring of 1888.

67 Q. Are you living there still?

A. I am.

Q. What building, if any, did you erect upon the premises?

A. A house.

Q. Who is occupying that house?

A. I and my family.

Q. You mentioned a short time since that you had a family living upon that part of it which was unenclosed. From about what time to what time did that family reside there?

A. It was not one, but several families. From the commencement in 1875 to about 1883.

Q. Did they actually live upon the land?

A. They actually lived upon the land.

Q. This, as I understand you, was outside of the enclosure?

A. Yes; the building was outside of the enclosure.

Q. You may state whether or not the complainant in this cause, from the year 1866 up to and including 1888, was in the actual possession of these premises in controversy.

A. Never to my knowledge.

Q. Have you known the premises all the time?

A. I have.

Q. You may state whether or not the complainant in this action, Mr. James M. Woolworth, built or constructed any fence around the premises in controversy or any part thereof during any of those years named, from 1866 to 1888, inclusive.

A. There was no other fence, only what I have stated, built by anybody.

Q. Give the names of the parties who were living upon that part of the premises enclosed and the times when they

68 resided there.

A. Mr. Pierce and Mr. Akin.

Q. From what time to what time, according to the best of your recollection, is it that Mr. Pierce lived upon that part of the land enclosed?

A. He lived upon that part from 1875 to 1879, I think.

Q. Who lived there afterwards on the part enclosed?

A. Mr. Aikin.

Q. About what time did he go on there, and about what time did he leave?

A. He went on about the time that Mr. Pierce left and continued until some time in 1883, I think.

Q. Were those parties living upon that land and residing there in your interest and for the purpose of holding possession of that for you?

A. Yes, by my permission.

Q. After the year 1883, on that part of the land which was unenclosed, was there any person living there actually; and, if so, who?

A. I think not, until I moved onto it.

Q. You may state whether or not one William S. T. Morton or Oliver P. Morton, either or both of them, was ever at any time in the actual possession of these premises from the year 1869 to 1888, inclusive.

A. Neither of them at any time.

Q. Were either of them in actual possession of this land prior to 1869?

A. They were not.

69 Q. You may state whether or not either or both of them attempted at any time to take possession of the premises within those years from 1866 to 1888, inclusive.

A. No; neither of them, nor any one else.

Q. You may state whether or not you and those whom you had put upon the land to hold it for you have been the only ones that have been in the open, notorious, exclusive, and adverse possession of all these premises from 1869 up to the time of the filing of this complainant's bill in this cause.

A. They were the only ones, to my knowledge.

Q. You may state whether or not you have used and occupied the whole of the premises in controversy as your own adverse to everybody.

A. I have.

Q. The plaintiff in this cause as well as all of his grantors?

A. Yes, sir; I have never been asked for possession nor ordered to leave by any living individual.

Q. If there is any other act of possession or ownership which has been exercised by you over the premises in controversy from the time when you first entered upon and enclosed a part by fence until the present time which you have not mentioned, state it now.

A. I have always treated the place as belonging to me in every respect; I have always treated it in that way.

Q. You may state whether or not you have always owned and claimed to own the premises from the time you have mentioned, in 1866, up to and including the year 1888 and up to the present time.

70 A. I have publicly and openly ever since I accepted the contract of the grantors and from the time the deed was given until it was recorded, or I took possession in 1865. I declined at first to accept the land in payment of what he owed me, but when I accepted the land I got the deed recorded.

Cross-examined by Mr. WOOLWORTH:

Q. You say you refused to accept the land for what—why did you refuse to accept it?

A. The deed was made out in 1864, some time in December, and I did not desire to take the land for the amount that Mr. Glass wanted me to take it until about 1865; still I held the deed; he gave me the deed and I took it, but we did not make our settlement until 1865, and when I accepted the deed, then I went onto the land.

Q. And recorded the deed?

A. Yes; immediately thereafter—that is, within the next year.

—. Mr. Glass owed you, did he?

A. I built him a house.

Q. And he was owing you on that house, was he?

A. I built him a house and I was to have the land for so much; the price was not fixed when the contract was made, as to what the land was to be, and when we came to settle he charged me $500.00 for the land, which I thought was too much.

Q. How did you make your settlement with him; did you allow him the $500.00?

A. I did.

Q. And that settlement was made about the time that you recorded the deed?

71 A. About the time I went in possession—in 1865.

Q. Then you recorded the deed?

A. No; I think I recorded the deed later.

Q. How much later?

A. In 1866, I think.

Q. Which part of the land is wooded or was at that time?

A. The east part was wooded over to the second valley; the west part was prairie.

Q. How much of the land was wooded?

A. About three or four acres on the west; three acres on the west was prairie, and all the rest was wooded, brush and wood.

Q. What kind of timber?

A. Nebraska timber.

Q. Can't you tell what kind of timber?

A. It was oak, ash, hickory, elm, pig-nut, and every timber, I guess, that grows in Nebraska that I have ever seen.

Q. A part was thick underbrush, was not it?

A. A part was, and the balance there was no underbrush at all; it was good pasture.

Q. How much of the wooded land was enclosed in the valley?

A. Not much; all of it was timbered or scattering timber in the valleys, and on the hillside was brush and timber.

Q. What part of the timbered land was the valley in proportion?

A. It was the whole valley.

Q. How much of it was valley?

A. The valleys were very narrow.

72 Q. There was not very much of a valley, was there?

A. There was a narrow valley running through, one on the west and one on the east side.

Q. Did you build your east fence on the line of the tract?

A. As near as I could ascertain from the corner and from the instructions given by Mr. Glass. We went right around the land when I bought it, and he showed me the corners. We went over it, the east line. The fence was built nearly on the east line.

Q. How on the north line?

A. It was very nearly on the north line.

Q. Was it on the land that now is the street—was the fence?

A. I think on the north side—was where Pacific street is.

Q. Was it in the street or on the edge of the street?

A. I cannot say as to that, whether it was nearly on the line. It was as nearly on the line as I could make it from sighting over the hill from Hanscom's corner. I made it on the line as near as I could.

Q. You could sight pretty close. Hanscom's corner was pretty near?

A. No; it was in the brush, and you had to go back on the hill to get your range across.

Q. Onto which hill?

A. The hill this way.

Q. Did you sight over to the poor-house farm?

A. Then you could get a sight across to the corner of section 28.

Q. Did you sight from the poor-house farm?

A. You could from the top of the hill, from the flag-staff.

73 Q. That would be the point to sight to if you wanted to get the line on the north side?

A. Yes, sir.

Q. Did you do that?

A. I did. I placed the line as near as I could; I placed a fence on the line as near as possible.

Q. Where was the potato patch that you speak of?

A. Just outside of the fence, on the west side.

Q. That would be on the west three and a half acres, would not it?

A. No, sir.

Q. On the west eight acres?

A. There was seventeen and three-quarters acres in the piece.

Q. In the valley — on the hillside?

A. On the hillside.

Q. On the west slope of the west gully?

A. Sloping to the gully.

Q. The west slope of the west of the two gullies?

A. West of one gully and east of the other gully.

Q. Then it was on the first hill going west, was it?

A. There is one hill in the middle, about, of the piece of land, and this was on the west slope of that hill.

Q. The other hill is on the west of that, is not it?

A. The other hill slopes from the other side down into the hollow. It slopes down from the west and down from the east on the west half. It slopes also from the west to the east on the east half and from the east to the west on the east half.

Q. You say you cultivated about two and one-half acres?

A. Somewheres from 2 to two and a half. I never measured it.

74 Q. How far was that piece of land from the south line of the tract?

A. It was probably eight or ten rods.

Q. Pretty near the south line?

A. It was pretty near the south side of it from the south line.

Q. That was in the timber, was it?

A. Yes; timber was all around it.

Q. How many seasons did you raise a crop on it?

A. Two, 1871 and 1873.

Q. Potatoes both times?

A. Yes, sir.

Q. Where was this house that you speak of?

A. On the edge of this prairie.

Q. The edge of the place where you raised the potatoes?

A. Yes, sir.

Q. How much of a house was it?

A. It was a house that people lived in.

Q. Describe the house.

A. It was made of boards; I cannot tell you the size; it might have been 15 or 12 feet square; it was in a square form.

Q. One story high?

A. Yes, sir.

Q. What kind of boards?

A. Pine boards.

Q. How much of a frame was there?

A. I do not know.

75 Q. Did you build it.

A. No, sir.

Q. Who did?
A. I don't know.
Q. Was it built—when was it built?
A. In 1875.
Q. Was there more than one house on the tract?
A. Not that I know of.
Q. How long did you say that house remained there?
A. Until about 1882.
Q. What became of it then?
A. I don't know.
Q. Did you see anybody take it away?
A. No, sir.
Q. Do you know anything about its being removed?
A. I did not. I knew it was gone, and that is all there is about it.
Q. Between the time that it was taken away and the time that you went there to live, in 1886, did you ever stay on this ground?
A. Yes, sir.
Q. Where?
A. On the west side.
Q. In a house there?
A. On the west side, over near 36th street, where the prairie is.
Q. In a house?
A. No, sir.
Q. Was not there any house there?
A. No, sir.
76 Q. Did you camp out?
A. Yes, sir.
Q. How high was this brush fence that you built?
A. Some places it was high and some places it was not so high; it was so as to turn cattle.
Q. Tell us how high it was in any place.
A. Trees were cut off from one foot to 3 feet high and lopped over and turned so as to make a slash fence, just so as to turn cattle.
Q. It was so that it would turn cattle from the time that you built it until what time?
A. About 1879.
Q. All that time did that fence remain there—large enough and strong enough to turn cattle?
A. Yes, with what repairs we done to it.
Q. How much did you repair it?
A. Every year. The town cows would get in through there and we had to fix it up.
Q. Did anybody else ever touch any timber there but you?
A. Yes, sir.
Q. Who?
A. I do not know; there was lots of it cut there.
Q. When was that done?
A. All along.
Q. All along from when?
A. From the time I owned it.
Q. People used to go in and cut timber?

A. Yes; sometimes they would saw it off and sometimes it was chopped off; it was gone and they kept taking it.

77 Q. Did not those men that you say you let live there look after the timber at all?

A. Yes, sir; that was their business, to look after the place, but those outsiders did not cut much while they were there.

Q. But after they went away, then they went in and cut?

A. Yes, and before.

Q. They cut there some while they were there?

A. They cut what they wanted for use for fire.

Q. The men that lived there?

A. Yes, sir.

Q. Outsiders, I mean.

Q. I do not know. I expect they did. I cannot say as to that.

Q. You never knew that I claimed to own the premises?

A. Yes; you bet I did.

Q. You knew that I claimed to own them?

A. Yes, sir; I knew th-t you claimed to own them but recently, and I knew that Mr. Morton pretended to claim them or you pretended to claim them for Mr. Morton; I do not know which.

Q. Who was this man Pierce? What was his name?

A. M. R., I believe, or J. H. N.

Q. Where does he live?

A. I cannot tell you now where he lives.

Q. How long since have you seen him?

A. I have not seen him for five years.

Q. What is Aikin's first name?

A. I cannot tell you just now.

Q. What is Aikin's business?

A. I don't know what he did.

Q. What did he do while he lived on those premises?

78 A. Worked wherever he could get work to do.

Q. A day laborer?

A. So far as I know.

Q. You do not know anything about what he did?

A. I do not know what he did, but that is the way he got his living.

Q. Did he have a family?

A. Yes, sir.

Q. How much?

A. I do not know.

Q. What was Mr. Pierce's business?

A. He was the same kind of a man.

Redirect examination by Mr. COVELL:

Q. The timber that you say was cut by outsiders, was it cut in the day or night time?

A. I cannot exactly answer that, but I think it was cut both, as near as I can get at it. Where trees are sawed down it does not look to me as though it was cut in the daytime, and especially when

you go over the premises and recognize this timber being there one day and being gone the next.

ALLEN ROOT.

79 GEORGE M. O'BRIEN, sworn for the defendants, examined in chief by Mr. COVELL, testified as follows:

Q. Where do you live and how long have you lived here?

A. I live in Douglas county, Nebraska; have lived here since 1866—that is, it has been my home since that time. I was here in 1864.

Q. Do you know the premises in controversy in this action?

A. I do.

Q. How long have you known them?

A. Since about 1867.

Q. You may state what you know, if anything, about a fence being built around a large portion of these premises, and by whom, if you know, and when it was commenced and about when was it finished, according to the best of your recollection, if you know.

A. I do not know at what particular time the fence was built. The fence was there in 1869. I claimed to own and do own one-half of that 80 acres, with the exception of the 17 acres and a fraction that is in dispute. The fence line on the east side of the whole 80 was there in 1868.

Mr. WOOLWORTH: I object to all this testimony as immaterial touching this fence.

The WITNESS: The character of the fence, as near as I can remember, was a board fence, in some places pieced out with long poles that supplied the place of boards that were missing. It was a post-and-board fence.

Q. On which line of the tract was it?

A. On the east side of the 80 acres. This board fence run down into the timber on the east side of a deep ravine and up
80 onto the slope of the hill where it was met with a common cattle fence—I don't know what kind of a name they call it—and this fence remained there and was there to my knowledge for several years until it was burned down by a prairie fire or something else. The fence was there in 1870, as I helped my father survey the south line of the 17 acres or the north line of this 62 and a fraction acres that I claim. It was there for a number of years. I do not know exactly when it was torn down. I do not think I knew the exact date it was used up.

Q. The board fence that you have mentioned, with poles, ran up to what point? That cattle fence, to what point did it run and what line of this 17-acre tract?

A. It run on the east line up to about, I would say, one-third of the distance, nearly half the distance, or the east line of the 17 acres.

Q. That was met by a cattle or brush fence?

A. Yes; brush—a cattle fence.

Q. To what point on that line did that extend?

A. To the section line.

Q. To the north line of the tract in controversy?

A. Yes, sir.

Q. On the north line of the tract in controversy, running westward, what kind of a fence was there?

A. I don't recollect that; my recollection is only in regard to the east fence, because we tried to get through there to get to the section lines.

81 Q. On the south line, do you remember how it was there?

A. The south line of the 17-acre tract, that was a brush fence, a kind of a cattle fence, and I think it was a board fence running up nearly to the poor-house farm line.

Q. On the south line of the tract?

A. Yes, sir; it was built something after the manner of the east-line fence, part brush and part boards.

Q. Was this on the south line of the tract in controversy?

A. Yes; it was a division fence.

Q. Between this tract and the tract that you owned or claim to own?

A. Yes, sir.

Q. That run up, you say, to nearly the west line of the tract in controversy?

A. That run nearly to the west line; it may have been two-thirds of the distance.

Q. Do you remember about the brush or any other kind of fence running northward from this fence on the south line towards the north line of the tract in controversy; and, if so, about where was that situated with reference to the west line of the tract in controversy?

A. I do not remember; I was not particularly concerned in that portion of the tract and never took much notice of what was there.

Q. What do you know or remember respecting a part of this tract in controversy being cleared off and being put into crops? And if you remember anything in regard thereto, state about what year it was done and by whom, if you know.

82 Objected to as immaterial, and counsel for complainant objects to all this class of testimony as immaterial and irrelevant.

A. I was out there several times with a son of Mr. Root's; I believe his name was Jay; I have not seen the young man for a number of years. I was out there with him on several occasions and hauled in wood to the city and was grubbing underbrush, and a part of the underbrush that they grubbed out was thrown into the ravine to keep it from washing out; but as for planting any particular crop, I don't remember whether any was planted or not.

Q. What year was it when you saw this grubbing being done by Jay Root, Mr. Root's son?

A. That was in 1868 or 1869.

Q. On what portion of the premises in controversy did you see this done?

A. That was done in the ravine or the valley portion, as I heard it described a few moments ago; this ravine or washout.

Q. How far from the west line eastward of that?

A. That is only a short distance west of the east line.

Q. Then, it was in the first ravine west from the east line where you saw Jay Root grubbing out underbrush?

A. Yes; where I helped him myself.

Q. Then, you say that part of it which was grubbed out was near the west ravine that runs across it?

A. He worked all the way up in around there, a lot of us; I was a young fellow then, and a lot of us boys used to go in and help him.

83 Q. Do you remember of seeing him do some of this work, over towards the west line, in or near the west ravine that runs northward across that piece of land?

Objected to.

Q. What is the facts respecting that?

A. The fact as I recollect it is that he worked all through the part that had brush and timber on.

Q. What is your recollection with respect to any portion of this tract in controversy being prairie land, or had no timber on it?

A. The west portion of the strip was open.

Q. About how much of the 17 acres was open, without brush or timber?

A. I would say about one-third of the 17 acres.

Q. What, if anything, do you know about the actual occupancy of these premises, or any part of the premises in controversy, by persons living upon the premises, and during what years, if you know, and on what part of the premises?

A. There was a small house on the land. I don't remember exactly the location of it. I think it was nearer the west than the east half, and kind of up on the side hill up towards the poor-house farm line. There was somebody living there. I do not know who.

Q. Where with reference to the south line and west line or about where did this house that you have mentioned stand?

A. It would stand nearer to the north line of the whole strip, and I guess it was just about the edge of the timber—the edge of the brush.

Q. About the edge of where the timber was at that time?

A. Yes, sir.

84 Q. During what years do you remember of seeing that house there?

A. I don't remember when I first noticed it, but I think that house was there in 1870—along in the early part of the 70's.

Q. You may state, if you remember, whether or not there was a road running between the premises in controversy and what was then known as Hanscom's farm, north and south and east of the board fence that you have mentioned on the east line of the tract in controversy.

A. The county road run along and turned the corner or cut across

a corner of Hanscom's place—I believed Mr. Avery lived in there—and turned the corner at Avery's place and came up to about midway on the whole piece of the 80 acres, and cut diagonally across towards the southwest corner of it towards Griffin's farm.

Q. Answer the question. (The question is read.)

A. That is the road I referred to; it runs around through there; I do not know how close to the fence; that old road is there yet.

Q. Was there any road running west from the northeast corner of the tract in controversy over to the northeast corner of the poor farm, or was that a section line without a road?

A. I don't think there was a road there; there was a farm run right up there—I think, Weatherwax's place.

Q. Joined this on the north?

A. Yes, sir.

Q. State whether or not there was a road running on the west side of the tract in controversy and between the tract in
85 controversy and the poor farm.

A. There was.

Q. Upon the south line of the tract in controversy, was there a road or not?

A. There was not.

Q. You may state, if you know, the length of time that the family you have mentioned lived in the house you have mentioned upon the west part of the tract in controversy, if you remember.

A. I think they were living there up to the time I went away from Omaha.

Q. What was that?

A. I left in 1873 and was gone nearly a year, and came back and went away again in 1874 and remained until late in 1875.

Q. When you came back were they still living there, do you know?

A. I don't remember.

Q. During what years did you, if at all, see Root or members of his family cutting timber off from the premises in controversy?

A. In 1868, 1869, and 1870, along there; I think, all of those three years.

Q. How near to those premises did you reside?

A. I lived on the corner of 18th and Farnam at that time, and, being interested in the other part, was out there sometimes every day in the week and sometimes once a month and sometimes three or four times a month; it was according to what the weather was. I was keeping track and looking after the other part.

86 Q. Then, you did see the premises in controversy during most of the time?

A. Yes, sir; I saw them quite frequently.

Q. Up to the time when you said you left Omaha and went away, and at the time when you were here after you came back, state whether or not there was any person in the actual possession of the premises there other than Mr. Root or the parties that you have named living upon the premises.

A. I never knew of anybody.

Q. You may state whether or not the complainant in this cause has ever been in actual possession of those premises during the time that you have known the premises in controversy, James M. Woolworth.

A. I never saw him out there.

Cross-examined.

By Mr. WOOLWORTH:

Q. This east fence was a board-and-pole fence, was it?

A. It was a board fence, with the exception—it would be called a board fence, but occasionally boards were broken off or missing and long poles had been nailed on in place of the boards—not enough to call it a pole fence.

Q. That was along the east side of the tract, was it?

A. Yes, sir.

Q. And the whole width of the tract?

A. That run from the south end of the 80 up to within a short distance of the north end of the 80, where it was met by this brush fence.

Q. This 80 was the 80 sometimes known as the North tract?

87 A. Yes, sir.

Q. The Jane E. North tract?

A. Yes, sir.

Q. This tract of 17 acres was a part of that 80?

A. Yes, sir; it was originally a part.

Q. I mean according to known surveys?

A. Yes, sir.

Q. This fence running the whole length of the 80 on the east side—it run the whole length, did it?

A. Yes, sir.

Q. Was there any road at any time at all within a few years on the west side of that fence—west of the east fence—besides the road that you have described?

A. The road runs along on the west side of the strip in front of the poor farm.

Q. I am not talking about the west side of the tract, but I want to know if there was any road along the east line of these particular premises.

A. Yes; for a part of the distance—that is, it was a kind of a serpentine road that, by custom, had been used as a county road. It did not follow the section lines at all. To illustrate: This being 80 acres, it came up from a point in here somewheres and diagonalled across the strip of the whole 80 in here, being the 17 acres.

Q. That road did not touch the 17 acres, did it?

A. It was on the other side of the fence.

Q. On the east side of the fence?

A. Yes, sir; and came through the fence on the north line on the North land—that is, the James E. North strip.

Q. But that fence did not actually touch this 17 acres at all, did it?

88 A. Yes, sir.

Q. Where?

A. The fence run right down into the timber and joined. I always supposed it was a part of the same fence, because where it run off the North tract it was by a board fence which run up a part of the way.

Q. Where did it run off the North tract?

A. Down in the timber—way down.

Q. On these premises?

A. Yes, sir.

Q. This 17 acres I mean.

A. Yes, sir.

Q. Where was that board fence?

A. It was on the east side of the whole strip, running straight north and south.

Q. That was the fence you first described, was it?

A. Yes, sir.

Q. Where did that road that you have described come through that fence?

A. That went through about—I don't know how many feet, but about ⅔ of the distance between the south end of the 80 and the north end of it, just about the head of that elevation.

Q. How did it cut the 17 acres?

A. The road did not touch the 17 acres.

Q. The fence on the south side of the 17 acres, what kind of a fence was that?

A. It was part brush and part boards.

Q. That is, the fence that separated the land that you and your father claimed from the premises in question?

A. Yes, sir.

89 Q. How much was brush and how much was boards?

A. I don't recollect how much.

Q. Give us a description of it.

A. Where it came out of the brush, out of the timber, it was boards, but generally in the timber it was boards and brush.

Q. Where did it come out of the timber?

A. The timber runs in and leaves a triangular portion of the strip—that is, there is a triangular portion of the 17 acres that has no timber but brush on it at all; that is the west part, and it run down to—like this distance (indicating), inside my finger being brush and timber, while out here it is open, and a part of the fence that came up was wood and boards.

Q. Then you say that all of the fence along the south side was a board fence?

A. Not all of it.

Q. How much?

A. A good deal was brush.

Q. How much was brush and how much boards?

A. There was, I would say, about half of it.

Q. Half of it boards and half brush?

A. Yes, sir.

Q. And that was the dividing line between the 17 acres of land in question and the land that you and your father claims, was it?

A. Yes, sir.

Q. The fences on the west side, the west fence, can you locate that fence with reference to the hills and gullys?

90 A. The west fence is on top of the ridge, on top of the hill; the fence on the extreme west of the piece that runs in on top of the ridge.

Q. Was that the first or second hill from the east?

A. It is up on top of the second rising; the first rise is a small one.

Q. This fence was on the top of the second rising?

A. Yes, sir.

Q. And that rising is pretty high?

A. It is quite a little hill.

Q. That is the highest part of the ground?

A. Yes, sir.

Q. How far north did that fence run?

A. I do not know. I know that the fence was there; that was a board fence, because I marked the surveyor's mark and dividing line between the 17 acres and the James E. North strip. I marked that on all the boards in the fence.

Q. You don't know how far that run?

A. I do not know how far it run on the north.

Q. What sort of a fence was on the north of this land?

A. I don't remember.

Q. Do you know where it is with reference to the line of the premises—the north line?

A. I don't recollect any fences on the north side of the seventeen acres at all.

Q. Where was this house?

A. It was on the slope of the hill, just about the edge of the brush, nearer to the north side of the tract than it was the south side.

91 Q. Was it on the first hill or second hill—the first rise or second rise?

A. Second rise.

Q. How far would you say from the north line?

A. It was further over towards that side than towards the south side. Looking at it from the James E. North strip, it would appear to be the north line of the other strip.

Q. You could see it easily from the North strip?

A. If you went out around and looked for it. I could see it from the hillside quite plain.

Q. Where is the hillside rise?

A. I don't know how to give an illustration of the topography of the country there. It is something like this: This being the second rise, the west line of the strip along here—there is a hump in the ground on the James E. North tract, which, in order to see this, I

think you would have to be over on that hump. If you were anywhere over on the southeast or south half of the North tract you would not see the house.

Q. Was it the timber that kept it from view?

A. It was the swelling of the ground and timber on the North place. This timber run clear into the James E. North strip quite a litte ways.

Q. That is, the timber on the southeast corner of the land in question extending over onto the North strip, did not it?

A. Yes, sir; this ravine with the timber on started from the James E. North strip and the timber grew in the ravine.

Q. Did you know the people who lived in that house?

A. I did not. I never knew who lived in there.

92 Q. Up to how late a time did Mr. Root's son work on these premises grubbing out—how late in the year?

A. 1868, 1869, or 1870, I think.

Q. Do you know anything about his grubbing there afterwards?

A. I rode into town with him on a wagon-load of wood, I think, a year or so afterwards.

Q. That is the latest that you know?

A. That is the latest I know of their cutting timber.

Redirect examination.

By Mr. COVELL:

Q. The wood that you have reference to, the load of wood was cut upon the land in controversy?

A. I suppose so.

Q. It was hauled from that land?

A. It came out of there.

Q. What do you mean to be understood by the James E. North or Jane E. North strip?

A. It is the remainder of that west half of the northwest quarter of the section; it is the other 62 and some hundredths acres.

Q. These premises in controversy were a part of the Jane E. North 80-acre tract, were they not?

A. Yes; they were a part of the Jane E. North 80 acres.

Q. When you spoke of the James E. North tract you meant the 62.27 acres south of the premises in controversy?

A. Yes, sir.

Q. When you answered Mr. Woolworth's question as to a board fence that run over towards the poor farm on the south

93 line of the tract in controversy you meant a board fence, did you, that divided the premises in controversy and the 62.27 acres?

A. I did.

Q. Is that board fence there yet?

A. A part of it.

Q. I believe you stated in answer to a question by Mr. Woodworth that the road, the serpentine road that you describe, did not run across any part of thid 17 acres?

A. I so stated; I don't think it did.

Q. Which side of these premises in controversy, this 17 and some hundredths acres, was it that that road run, if you remember?

A. That serpentine road run along on the east side.

Q. Do you know where the house in which Mr. Root lives with his family is situated on this tract in controversy, about what part of it, the house he lives in at present?

A. I do not.

Q. Then you spoke of the place from which you could see the house in which parties live that you mentioned before, being towards the north line of the premises in controversy; at what point was it that you meant it could be seen upon the premises in controversy; was it upon the highest part of the premises in controversy?

A. Anywhere on the high land on the premises it could be seen, but extending on the other strip there is a hump in the hill.

Q. That is, standing on this 62 acres?

94 A. Yes; there is a hump where you would have to be pretty well over towards the north side of the 62 acres to see the house on the 17 acres.

Redirect examination.

By Mr. WOOLWORTH:

Q. The only fence that you ever saw upon the premises was the fence that you have described, was not it?

A. I know that the fence between the poor-house farm and this strip was in existence there.

Q. Excepting that you have described all the fences on the premises in question that you ever knew of?

A. That I know of. I might have known of some others, but I do not remember them now.

GEO. M. O'BRIEN.

95 JOHN A. MARSH, sworn for the defendant, examined in chief by Mr. COVELL, testified as follows:

—. State where you live and how long you have lived here.

A. I have resided in Douglas county this last time since 1864. I came here in 1856 and staid here one year, and came back again in 1868 and staid until 1860. I know the premises in controversy.

Q. Were did you reside from 1864 up to the present time with reference to these premises in controversy?

A. I resided in 1864 until 1867 on Harrison Johnson's farm, in Saddle creek, then moved on block 21, West Omaha, in 1867 to 1868, and moved from that on Leavenworth, and have been in that vicinity ever since.

Q. These placed where you have lived are in the vicinity of these premises?

A. The Johnson farm is probably a mile and a half west.

Q. The other places are close to the premises in controversy?

A. Yes; 40 acres between them, I believe.

Q. When did you first become acquainted with these premises in controversy?

A. I have been acquainted with that 80 acres of land since 1856. I worked for Harrison Johnson two or three years on his farm when he lived where Connell does, and I went back and forward every day across this land.

Q. The 80 acres?

A. Yes, sir.

Q. Of which the 17 acres is a part?

A. Yes, sir.

96 Q. You may state what you know, if anything, about the fences being built around a part of this 17 acres; and, if so, when they were built, the character of the fences, and on what lines, if you know, they were built.

The plaintiff objects to all this class of testimony as immaterial and irrelevant.

A. I do not know very much about the fences. I have a recollection of there being a brush fence on the east portion of the 17 acres. I could not tell you when it was built. It was built in the latter part of the 60's or early part of the 70's.

Q. When did you first see this brush fence around the premises in controversy?

A. About 1870 or 1871; somewhere along there.

Q. State if this brush fence—which lines this brush fence was upon of the premises enclosed.

A. I think a little portion of it was on the east and a portion on the north.

Q. What about the south line of this 17 acres?

A. I think there was a fence there. I am not sure.

Q. Do you remember or not of there being a fence running north from the south line and a little more than half way from the east line of these premises towards the north line—a little more than half way from the east line to the west?

A. I think there was a fence there, but I cannot describe what it was.

Q. About when did you first see that fence running north from the south line towards the north line?

A. About the same time.

97 Q. How long do you know of this fence continuing there that you have mentioned?

A. I could not say; I saw them a time or two, but as to the length of time I could not state.

Q. About when was the last time that you saw them there?

A. That I could not say. I suppose the fence was up there probably a couple or three years.

Q. What kind of a fence was upon the east line of this 17 acres, if you know?

A. I believe I stated I could not tell exactly what kind of a fence that was. I have a recollection of the fence, but cannot state the kind.

Q. The line that I now mention and am inquiring about is the line between the Hanscom farm, or nearly on the line between the Hanscom farm and the 80-acre tract that you first mentioned, running north and south, which would be about the east line of the premises in controversy?

A. Yes; that would be the east line.

Q. Upon the north side of the premises in controversy what kind of a fence was there when you saw it, and when did you see it, if you saw it at all?

A. I have seen a fence there. It was a brush fence. It was in about 1871, 1872, and 1873, I would think.

Q. Do you know how far west that brush fence on the north of the premises run?

A. I think it was somewhere near the first hollow running from the east, going west.

Q. Do you know where the house in which Mr. Root now lives upon this tract of land is situated?

A. Yes, sir.

98 Q. Did it or not run as far west as the north line of this tract as where that house is now situated?

A. It may have run that far; I could not say. My remembrance is that it was more in the hollow on the west side of the ravine.

Q. The fence which you stated as having seen running across this tract in controversy from the north line towards the south line, how far from the house in which Mr. Root now lives was that fence, if you remember—that is, from the place where the house stands; I mean the one on the west part of the enclosure?

A. I could tell you nearer where the house was located on the 17 acres.

Q. Was the fence east or west?

A. East.

Q. How far east.

A. I could not state.

Q. Could you state about how far?

A. It was probably two or three hundred feet. I am not clear on that.

Q. And that fence ran from the north to the south and from the south to the north line?

A. Yes, sir.

Q. What do you know about the unenclosed portion west of that fence of these premises in controversy? What was the character of the ground and its situation at the time you remember seeing this fence there?

A. The west half of it—there was a ravine running up from towards Leavenworth street. There were two ravines; one runs up through the west half of this 17 acres, leaving about 3 or

99 four acres or probably more—maybe five acres—on the west of the ravine; a part of that was prairie.

Q. How much of that was prairie?

A. Probably two or three acres.

Q. Was any portion of that timber?

A. Yes; a portion was timber, the east side.

Q. Do you remember of seeing any portion of that in cultivation?

A. Yes, sir.

Q. Where was that part that was under cultivation, and when?

A. My recollection is it was on the west side of this ravine, on the hillside; a portion of that timber was grubbed out.

Q. The west side of this west ravine?

A. Yes; it run down into the ravine or close to the ravine; there was no water in the ravine.

Q. The northwest corner of this unenclosed part of the premises in controversy was in the timber. Was there any timber there—up towards the northeast corner of the poor farm?

A. No; no timber on the west part of this 17 acres at all.

Q. The timber was east of this west ravine, was not it?

A. There was a little timber on the west side of the ravine.

Q. The most of the timber was on the east side?

A. Yes, sir.

Q. Do you know anything about Mr. Root or members of his family cutting timber on the part unenclosed or part enclosed by this fence that you have described? And, if so, state when you knew of it or saw it, if you saw it.

A. I never saw Mr. Root cutting timber, but I had a couple of young men working for me, herding cattle and doing chores,
100 and they told me that——

Objected to anything that was told.

The WITNESS: Of course I cannot say that I ever saw him cutting timber.

Q. Did you see any of the members of the Root family hauling timber away from there that was cut on the land?

A. I believe I saw Jay hauling timber from there, but never saw him cutting any.

Q. When did you see that done?

A. That probably was in 1871 or two; it might have been in the latter part of the sixties.

Q. What years was it that that portion of the ground that was grubbed out was in cultivation, if you remember?

A. I think it was in the early part of the seventies; that is my best recollection.

Q. After the year 1873 have you known these premises in controversy pretty well?

A. I have lived close to them—within a quarter of a mile of them. I have not been on them much, but I have been by them on 36th street.

Q. Have you passed by these premises frequently since 1873?

A. Yes—that is, on 36th street.

Q. When you saw these premises in controversy, say from the years 1873 up to 1888 and 1889, who have you seen in possession of the premises in controversy?

A. Mr. Root is the only person that I have seen there.

Q. How often during the years from 1873 up to 1889 have you passed the premises in controversy, say on 36th street?

A. Last summer I passed every day for about 4 months. I built a house out in the poor-farm addition.

A. In 1874, 1875, and 1876?

101 A. I did not pass it so often then, but occasionally.

Q. Did you pass it frequently each year?

A. Yes; several times during the year.

Q. And during all of the years up, say, from 1873 to 1879, did you pass it frequently each year?

A. Yes, sir.

Q. Have you ever seen any other person in possession of those premises—actual possession of those premises—than Mr. Root?

A. No, sir.

Q. Or parties that he may have had on the land? During all of the times that you have passed those premises have you seen Mr. Woolworth in possession or on the premises?

A. No, sir.

Q. During the most of the time that you have known these premises has that portion that you have first mentioned as having been enclosed, has that been enclosed by a fence?

A. That I could not state. I have not been much over on the east end. I have not been on the east end probably more than once or twice in the last eight years.

Q. It was the west end of the premises that you passed?

A. Yes; on the west side.

Q. What do you know about any house or houses being upon the west part of the premises in controversy outside of the enclosure made by the fence you have mentioned, if anything?

A. There was a little house between the two hollows just outside of the brush. There was two ravines—one turned off towards the Hanscom tract and the other towards the poor farm, and

102 this was probably just outside the place on the point. There was a house which was occupied, I do not know by whom. I saw there was people living there.

Q. When was that that you remember of seeing that house there?

A. That I cannot state. I have seen the house there as much as one or two years; I think in 1880 or 1881. It might have been there in 1879.

Q. You cannot fix the year when you first saw it or last saw it?

A. No; there was a house there which had been occupied.

Q. About where was this house situated, say, with reference to the west line and north line of the premises in cont-oversy—that is, how far from the west line and how far from the north line, according to the best of your judgment?

A. I would think the house stood about one-third of the way from the poor farm, running east of this tract.

Q. How far from the north line towards the south line, about?

A. It was nearly on the south line, I would think.

Q. Pretty near the south line?

A. Yes; not far; I could not state. I should say just about where the house—I could show a man if I was out there just about where the house stood.

Cross-examined by Mr. WOOLWORTH:

Q. You know about this land so well I think you can give a description of it, so that when it comes to the judge he can understand it. Now, I want you to describe the land. What was the nature of the land on the east side of this 17 acres; did it lie high or low?

103 A. The east end of this 17 acres runs up onto a hill, but not clear to the top.

Q. At the beginning was it high or low land?

A. It was rather high.

Q. From the east line of the tract how did the ground run, did it rise or fall?

A. Commencing at the northeast corner——

Q. At the northeast corner—here is the east line of the tract; I want you to describe the piece of ground until you get over to the west line of it.

A. The ground slopes down this way down into the ravine gradually, probably 20 or 30 feet wide, and goes up quite a grade and down again into another valley—I do not remember the width—a little dry ravine, and then runs up again to the west line to the poor-farm corner, making two ravines.

Q. Between the last rise and the poor farm is not there a ravine, is not there a place where the land runs down quite low?

A. There is two ravines in this tract of land.

Q. And two hills or rises?

A. Yes; each end is high, and the middle of the tract is high; it goes down this way into a ravine up over a divide, down into another one, then up to the poor-farm corner, is my recollection of —.

Q. So that it is pretty level from the second rise up to the poor-house farm, is it?

A. No; there is quite a depression in the grounds.

Q. That is what I want to get at; the place where this house was, was it over the first hill from the east?

104 A. It would be a little over the first hill—that hill that runs up between the two valleys; a little over, I think, on the west side of that point; I think it was a little lower ground there than east of it.

Q. Do you mean to say that that was two-thirds of the way over to the poor-house farm—this place that you speak of?

A. I would say it was in that neighborhood.

Q. Do you know who built that house?

A. No, sir.

Q. Do you know any of the people that lived in it?

A. No, sir.

Q. Did you ever know how they came to live there?

A. No, sir.

Q. Did you ever see Mr. Root around there—around the house—the old house that stood there?

A. No; not that I remember of.

Q. Did you ever see Mr. Root on those premises until he went over there to build the house that he is now living in?

A. I could not state; I do not remember positive that I ever saw him.

Q. 36th street is the street that runs between this tract and the poor-house farm, is not it?

A. Yes; it runs west of it.

Q. And that is the street that you have been accustomed to travel?

A. Yes, sir.

Q. And the east part of th- land I understood you to say that you have not seen for a good many years?

A. I have seen it occasionally, but not very frequently; I
105 have seen the land, of course, from 36th street, but not to be close to it; not closer than that once or twice I have been on that in three or four years.

Q. There is not any travelled rout- or has not been until the grading of Poppleton avenue—any travelled route across or near this ground?

A. Not that I know of.

Q. For a good many years?

A. No, sir.

Q. Not since that road, the old Bellevue road, was closed up, was there?

A. That road ran around Hanscom tract; that never run across this tract.

Q. It run near it, didn't it?

A. Yes, sir.

Q. And there was not any road around that tract after that road was closed up?

A. Not that I know of; not until those streets were opened in the last 3 or 4 years.

Q. That road that run around by Hanscom's farm you remember that used to be called the Bellevue road, do you not?

A. We used to call it the Griffin road; it is all the same, anyway.

Q. How near this ground, this 17 acres, did that road run?

A. That road probably left a three-cornered strip in Hanscom tract between the road and this 17 acres; it probably run very close to it at the south corner—that would be the southeast corner of the 17 acres; it probably came pretty close there, but there was a three-cornered strip of timber where this road left to the west, that was west of the road that was west of the old road that run around
106 Hanscom tract.

Q. The road run through the timber?

A. It run east of the timber. I think there was a three-cornered strip there and probably came pretty close to the 17 acres at the southeast corner.

Q. Don't you remember that at the southeast corner of this 17

acres there was a washout—a gully—and that kept washing out more and more and the roads kept going further to the east, near the southeast corner of these premises, where the road turns around at the head of this hill?

A. Yes; I remember where it cut out there.

Q. The road kept going to the east of this gully, where it washed out there?

A. Of course; it kept a little further east and a little further south, too; a little more south than east; you had to turn to the east to go around the head of the hollow.

Redirect examination.

By Mr. COVELL:

Q. In describing the ravines that run across this tract of land in controversy you mean there are two ravines, one very deep and one not so deep?

—. ——.

Q. The deepest ravine is towards the east line, is it not, of the premises running north and south?

A. Yes, sir; I would think it was the deepest ravine which runs from this side; the next ravine is still west of the house where Mr. Root now lives.

Q. And those were the two ravines that you mean running across the premises?

107 A. Yes, sir.

Q. And between these ravines is the highest part of the ground, is it?

A. I would think it was fully as high as it was at either corner.

JOHN A. MARSH.

108 P. M. C. TUTTLE, sworn for the defendant, examined in chief by Mr. COVELL, testified as follows:

My name is P. M. C. Tuttle; I reside in Omaha, Nebraska. When I came here in 1864 I rented on the corner of 14th and Capitol avenue, and lived there some eight months. I leased a lot then from Dr. Lowe, down on 13th street, I believe, near Tim. Kelley's place, and built me a little house there, right by the side of Jim Creighton's property. I lived there, I guess, 8 or 9 months before I sold out; I bought then right back of the high school, and built me a house. I guess I lived there about 14 months; I sold out there, and the next house I built on leased ground from the city on Ninth and Capitol avenue; I sold out there and went into a place on Jackson and 14th street; I lived there 14 months, and then rented across the street from Homan's daughter; she was a widow, I have forgotten her name——

Q. I want to get at your residence in Douglas county?

A. I have been in Douglas county ever since 1864.

Q. Do you know the premises in controversy?

A. Yes, sir.

Q. Since when have you known them?

A. Since about 1869.

Q. How often since 1869 have you seen the premises in controversy?

A. I was there off and on every winter; it was my hunting ground there. I used to hunt through there, and I recollect of seeing a brush fence there; I got several rabbits in that brush fence.

109 Q. Where was that brush fence, on which line of the premises in controversy?

A. I could not tell you just where the lines are, but it was on the northeast part of the ground, I think, to the best of my recollection.

Q. Do you know of a fence being situated along the east line of the 17-acre tract in controversy; and, if so, what kind of a fence was that?

A. There was some boards and coals constituting a fence, but the most of the fence there was brush fence.

Q. Did that fence that you have just described run from the northeast corner of the strip towards the southeast corner?

A. Yes; until it met a portion of the brush fence; it run from the southeast corner—the board part did—down towards the northeast corner until it met the brush fence.

Q. That brush fence that it met, did that extend to the north corner of the premises?

A. I think it did. I know the fence had a turn in it, the brush fence.

Q. On the north line of the premises in controversy, being the north line of the 80-acre tract that was formerly owned by James E. North, what part of the fence, if any, was upon that?

A. I could not state. I don't think I was up around that part of the fence, because it run out near the prairie.

Q. On the south line of this 17 acres, about where Poppleton avenue is now situated, if you know where it is, what kind of a fence, if any, did you see run west on that line?

110 A. There was some boards and some poles.

Q. Was there any brush fence there?

A. I do not know.

Q. How far west do you know about that the fence extended?

A. I could not state that.

Q. You may state if you went over a portion of the premises in controversy at any time or times during the years that you have known it; and, if so, what portion.

A. I went across the northeast corner of the lot several times. There were three years that I have hunted in there, and that is where I generally got my game; was in that old brush fence.

Q. What years were they?

A. It was 1869, 1870, and 1871; probably as much as 1872. I know it was three or four years in the winter season that I hunted there.

Q. Did you know of a fence being built from the south line to or towards the north line of the premises in controversy about half

way or two-thirds of the way west of the east line; and, if so, what kind of a fence?

A. I could not state as to that because the fence run west. It seems to me there was a little kind of a shanty right along the fence; I think just outside of the fence; to the best of my recollection it was close to it anyway, and I could not see from where I was at, because they stopped me once from tearing down the fence, the parties who lived there. I was pretty shy in getting my game.

Q. You remember of seeing a brush fence run northward?

A. Some kind of a fence run northward from the east
111 end. On the east end I do.

Q. Then there is a fence running from the northeast corner, running west, running up to where that shanty was?

A. Yes, sir.

Q. The shanty that you have reference to, where did that stand?

A. It stood, to the best of my recollection, about where the turn of the hill starts, towards the west end.

Q. Speaking with reference to the east line, about how far west of the east line of the premises was it?

A. I would think it was over half way.

Q. Speaking with reference to the north line of the premises, about how far from the north line was this shanty that you have mentioned?

A. It was right on the north line. I do not know whether it was outside the line or on the line or right inside of it. I know the fence run up to it.

Q. Which one of the fences?

A. The one that run west from the northeast corner.

Q. Getting from there to the south did you see a fence there running southeast of that shanty?

A. I did not go up that far.

Q. Do you know of there being a shanty down towards the south line of the premises, along towards the south line and nearer the west line of the premises?

A. I don't recollect. It might have been a little further than I stated it was, but I think it was about the center.

Q. Do you remember of seeing the part of the land in controversy that was grubbed out and put in crops?

A. I know there was a little piece grubbed out and cleaned up,
but it was in the winter, and I didn't see any crop on it. I
112 never was there unless there was from 6 to 8 or 10 inches of snow, because I take that time to hunt.

Q. What winter was it that you say that was grubbed out?

A. It was in 1869, 1871, 1872, or probably 1873; along there.

Q. How far from that piece that was grubbed out was this shanty that you have mentioned?

A. It seemed to be right at the edge of it.

Q. Which edge?

A. The north edge.

Q. Were other people living there?

A. Yes, sir.

Q. Do you know who the people were?

A. No; I know they hollered at me and came out and drove me away from tearing the fence away one day; I did not know but probably they owned the land.

Q. Have you since 1872 seen the land in controversy frequently?

A. Yes, sir.

Q. Mostly ever year, have you?

A. Pretty nearly every year; I reckon every year.

Q. You may state whether or not you have seen Mr. Root or members of his family during any of the years, say, from 1872 up to 1889 cutting any timber on there or in actual occupation of the premises.

A. I never did. The first of my seeing or knowing Mr. Root was on it was since he has been living in that house that he has built?

Q. You may state if, during the times that you have seen this land in those years, say, from 1873 up to 1889, inclusive, if

113 you have seen Mr. Woolworth upon or about the land.

A. I never did.

Q. How often, during the years that you have seen it, have you been in sight of the land?

A. I passed along there every two or three weeks; sometimes five or six times during that length of time.

Q. And that pretty nearly every year?

A. Yes, sir.

Q. What was the character of the land—that is, with reference to being prairie or timber?

A. It was mostly timber.

Q. How much was prairie?

A. I think about 2½ or three acres on the west line of it was prairie.

Q. The rest was timber and brush?

A. Yes, sir; the most of it, I think, has been cut for the last few years.

Q. Most of the timber?

A. Yes, sir.

Q. Do you know who cut it off?

A. I do not.

114 Cross-examined.

By Mr. WOOLWORTH:

Q. Did I understand you to say that you did not know anything about any house being on the south part of the land?

A. No; I do not think it was on the south part of the land; it was on the north part, just outside of the north line, or about the north line.

Q. It was just the one house that you have spoken of that was on there?

A. Yes; it was a small shanty.

Q. What kind of a house was it?

A. I think it was built of boards.

Q. Shingled?

A. I would not say whether it was shingle or board roof.

Q. There was not any other improvements there except the house?

A. Just a piece of land had been grubbed out. I don't know whether it had been in cultivation, but it was enclosed with this fence that I speak of.

Q. How much land should you think was enclosed in the fence?

A. As near as I can make it out, I think four or five acres.

115 CHARLES S. AVERY, sworn for the defendant, examined in chief by Mr. COVELL, testified as follows:

My name is Charles S. Avery; I know the premises in controversy in this action, and have known them since 1870 or 1871.

Q. You may state if you remember of seeing a fence around a part of these premises; and, if so, what kind of a fence and where it was situated.

Objected to as immaterial and irrelevant, and plaintiff asks that this objection apply to all of this class of testimony.

A. In 1870 I saw where the brush was cut on the south line and piled over and made a fence, and where a space was cut through on the east line, but I could not say as to whether there was a fence on the east line or not, but I saw where the space was cut through for a line west, from the southeast corner westward. On the south side the brush were cut out and the line was put through and the brush piled over and made a fence.

Q. How far west did that extend from the southeast corner?

A. I could not say just how much, but quite a long ways west.

Q. Do you know where the house is situated that Mr. Root lives in now; and, if so, did it go as far west as a line running south from that house on the tract?

A. Yes; the line went fully as far as his house sets now.

Q. Do you remember about there being a fence running northward from the west end of this brush fence towards the north line; and, if so, what kind of a fence was it from the west end of this brush fence?

A. No; I believe not.

116 Q. You don't remember about that?

A. No, sir.

Q. Do you know what kind of a fence there was upon the east line running from the southeast corner northward of this tract?

A. I could not say. On the east line all that I remember of seeing of that—I might have seen the fence—the space cut from the southeast corner on the east line—but I could not say what kind of a fence there was there, but the south line there was brush.

Q. That is clear in your memory?

A. Yes, sir.

Q. What do you know, if anything, about the north line of this tract being enclosed—that is, the fence running along it?

A. I do not know as I remember anything about the north line. The north line is the place I was not by as much as this other corner.

Q. How near did you live to the premises in controversy in the year 1870 and on?

A. We lived just across the line on the Hanscom farm—just across the road east of the premises.

Q. How often from that time on have you seen the premises in controversy; say from 1870 and 1871 up?

A. From 1870 and 1871 I was by there nearly every day herding cattle in the summer time, and in the winter time I was not around so much, but in the summer time I was around there pretty nearly every day herding cattle.

Q. How was it in 1872?

A. We moved out where we live now.

117 Q. Where do you live now?

A. At McArdle precinct, 9 miles west of here.

Q. In 1870 and 1871 what did you see being done by Mr. Root or any of the members of his family on those premises?

A. I do not know as I could say I saw any one doing anything on those premises in 1871, nor I could not say who done it.

Q. What, if anything, do you know about the members of Mr. Root's family cutting and hauling wood off from these premises?

A. I do not know as I ever saw any of Mr. Root's family ever hauling timber.

Cross-examined.

By Mr. WOOLWORTH:

Q. You say you went out to McArdle's to live in 1872?

A. In the fall of 1871.

Q. You have lived there ever since?

A. Yes, sir.

Q. From that time on did you go by those premises very often?

A. Not very often from that time on.

Q. The road in from McArdle's from your place was not by these premises?

A. We came by, yes, sir, when we first went out there; but the last seven or eight years we came in Leavenworth street.

Q. Was this fence in the east of the tract the dividing fence between Hanscom's farm and these premises?

A. There was a road between the Hanscom farm and these premises. The fence on the east line I am not so sure. There was

118 a line cut through, but I am not so sure about the fence being on the east line; but on the south line there was a brush fence.

Q. There was not but one fence?

A. Only one fence is all I noticed. The line was cut through the brush and the brush laid over.

Q. Do you know when that fence was cut through?

A. It was cut through before 1871. It must have been in 1870 or 1871. It was before we moved from the Hanscom farm.

Q. Can you tell how long that fence was on the south line?

A. I could not tell you exactly how long it was, only from the looks of it from the road. I do not know that I was ever on the south line.

Q. Guess at it.

A. I would guess it was close onto 20 rods—15 rods, anyhow—as near as I can remember.

CHARLES S. AVERY.

119 JOEL A. GRIFFIN, sworn for the respondent, examined in chief by Mr. COVELL, testified as follows:

I reside near the premises in controversy and have lived there 15 years; have known the premises since 1856.

Q. You may state if you know anything about fences being built around any portion of the premises in controversy; and, if so, what years they were built and how long they remained there, and what part of the premises, if any, they enclosed.

The complainant objects to all testimony in regard to this fence as irrelevant and immaterial.

A. In 1868 and 1869 father and I used to drive cattle down through the hollow going to Sheeley's slaughter-house; that is the only way I can get at the time I saw the fence; most of the fence that I remember was built out of brush; some one had cleared off and piled up the brush; I know we had trouble with them; I know we got our cattle in there sometimes; it was not a very good fence; steers would run through it and jump over it. That was on the southeast corner of this tract, running down into the hollow; we used to come into the ravine and go down that way because we could strike a little creek down towards Leavenworth street and put them in there and water them and drive them along down.

Q. What do you remember about the fence being upon the east line of the premises in controversy in this action?

A. The east-line fence bothered us more than the balance; we would strike the corner of the east line in driving down the hollow;
120 not on the east line; on the south line; south line, I think it would be; the east-line fence I did not know.

Q. Turning your attention to the south line, was that near to where Poppleton avenue now is?

A. Yes, sir.

Q. Where did the fence commence there with reference to the southeast corner of this tract, and how far west did it extend that you have reference to now?

A. It commenced somewhere near Hanscom's corner, or somewheres thereabouts, as I remember it, and ran down into the hollow. I do not know how far upon the other side of the hill; we used to go

down across the corner of it, and the brush would come down, and the cattle would run through it and follow the hollow down.

Q. This fence is the only one that run west where Popleton avenue is situated?

A. Yes, sir.

Q. You don't remember how far?

A. No, sir.

Q. Turn your attention to the southeast corner of this tract in controversy and go northward to the northeast corner. What sort of a fence was there, if you know?

A. I do not know, only as I saw it by the road; the road used to run around the corner of Hanscom's fence; it seems to me that right at the corner was posts and cotton-wood.

Q. Which corner?

A. The southeast corner cornered by Hanscom.

Q. How far towards the northeast corner did you say that extended?

121 A. I did not pay any attention to that.

Q. Do you know whether there was any fence on the north line, running from the northeast corner westward?

A. I think there was. Yes; there was a little place in there that was covered with grass. There was not very much timber on it, as I recollect now. I have been in there 2 or 3 times strawberrying with mother. She used to come in there, and sometimes when we were coming to town we would bring her down there and drop her, and when we came from town there used to be a road that run down to the edge of the hill from the hollow—run from the poor farm—a kind of a road that Mr. Selden traveled, and we could travel it with a wagon and cross this muddy stream. There was a bad crossing there, and we used to drop her out on that and come out on the road on Leavenworth street, and coming back we would pick her up; father and I did.

Q. The fence on the north line—do you remember how far west it extended?

A. I do not know anything about the line, but there was a fence there.

Q. About how far west do you know that extended from the north corner of the tract on westward toward the west line?

A. As I remember about to the top of the hill or over the top of the first hill. I cannot say positive.

Q. Between the two ravines running north and south?

A. Yes; as near as I remember.

Q. The top of the hill is between the two ravines?

A. Yes; there is two ravines. One is a good deal more of a ravine than the other.

122 Q. You mean this fence extended to the top of that hill?

A. Yes; as I remember it.

Q. Do you remember of seeing any fence running from the west end of that fence extending south towards the first fence that you mentioned, the fence on the south side?

A. I think there was a fence pretty near the whole length of it; pretty near the line of the property in controversy, I believe.

Q. That is, that line running south?

A. South from a point on the line of the property running north and south.

Q. This last fence that you have reference to run north and south?

A. Yes, sir.

Q. That, you think, extended down to the brush fence on the south line, do you?

A. Yes, sir.

Q. And westward from that fence that you have just described towards the west line of the tract, what was the character of the ground; was it timber land or part timber or part prairie?

A. There was timber. A good deal of the tract was more brush than timber, but a little timber in the hollows. It got more timber later years. The early part of the time there was not very much timber there; there was a few trees.

Q. West of that west ravine on the tract what was the character of the land there?

A. Brush and might have been some trees west of the ravine, but in the ravine there was quite a little sprinkle of timber, and the west side was spots of brush, but mostly prairie.

Q. When was it that you saw this fence there that you have reference to?

123 A. From 1868 to 1870 or '71, I would judge—along in those years.

Q. When did you last see them there?

A. I could not say.

Q. Do you know anything about there being a house or shanty, whatever you may call it, upon the west part of this tract; and, if so, where, if you know, was it situated?

A. I know of there being a shanty or house, but I cannot locate it. It seems to me that it was on the west side of the first hill coming from the east.

Q. Going from the east toward the poor farm?

A. Yes; I cannot say positive.

Q. When did you see that there—that is, about when was the last time that you saw that?

A. About 1869, I think, was the last time that I remember of being over there.

Cross-examined.

By Mr. WOOLWORTH:

Q. You knew the north 80, did you not—what was known as the North eighty?

A. Yes, sir.

Q. Which Mrs. North pre-empted?

A. Yes; there was something about it. We at one time——

Q. Do you know at this time where the corner of that 80 was?

A. No, sir.

Q. Could you tell whether the corner of the 80 was south or north of Pacific street—what is now Pacific street?

A. I supposed that road was on a section line, or supposed to be in the center of it. I am not certain about that.

124 Q. You do not know whether at that time the northeast corner was north or south of that street, do you?

A. No; I do not.

Q. This ravine where there was a little grass and the water run; didn't that run clear on down north for a distance as far on beyond as where Leavenworth is now?

A. Yes, sir; it run clear down to Sheeley's slaughter-house.

Q. When you come in on the road from your farm your cattle used to go down that gully?

A. Yes, sir; and we used to sometimes get across the prairie and come up over the hill and not follow the road that used to come around by the poor farm and run down that deeper gully; that was all open country at that time.

Q. There was nothing much there?

A. No, sir.

Q. You drove right on down through that gully, north of where Leavenworth street is now, before you turned into town, didn't you?

A. We just followed that down. Sheely had his slaughter-house at the foot of that creek on away down toward Cuming St., and we used to follow that clear down to Cuming street, and went that way because we could get water. In hot weather it was better.

Q. This north fence, you cannot tell whether it was on what is call- Pacific street or further north, can you?

A. No; I didn't pay any attention to it. It was on the same line, or I supposed it was. I did not know what line it was on.

Q. You followed down the gully and didn't pay any attention?

A. No; only when the streets would get inside of it.

J. A. GRIFFEN.

125 JAY C. ROOT, sworn for the defendant, examined in chief by Mr. COVELL, testified as follows:

Q. Are you acquainted with the defendant in this action?

A. Yes, sir.

Q. You are a son of the defendant, Allen Root?

A. Yes, sir.

Q. How old are you?

A. I will be 31 next August.

Q. Do you know the premises in controversy in this action on which your father now lives; and, if so, how long have you known them? You do know them?

A. Yes, sir. I have known them as long as I can recollect.

Q. If you know anything about any fence having been built around the premises in controversy, or a part of the —, state what you know about it, who built them, when they were built, and all you recollect in respect thereto.

Objected to as immaterial and irrelevant, and all matters in relation to this fence.

A. I recollect the west fence; it was a brush fence and built very near the top of the hill—that is, inside the inclosure.

Q. Who built it?

A. I don't recollect who built it; I know I helped some.

Q. Who cut the brush and helped built it besides yourself if you helped build it?

A. Father was there, and the hired man.

Q. When was that west fence built that you speak of?

A. I don't recollect what year.

126 Q. About what year? Get at it as near as you can remember.

A. It was back of 1870, but I could not designate the year.

Q. Back of the year 1870, was it?

A. Yes, sir.

Q. Where did it commence and where did it end, this west fence that you speak of?

A. It commenced up on the hillside, I think, about 100 or 200 feet east of the house on the south side and run across; I do not think it run straight north; it varied a little to the east down into the hollow.

Q. State whether or not it extended from the south line of the premises as they now are, nearly where Poppleton avenue is now situated, up to the north line.

A. Yes; I do not know where the line was, but about—there was about where the fence run.

Q. State whether or not there was a fence on the north line running from the point where the north end of this west fence stopped eastward to the northeast corner; and, if so, what kind of a fence was it.

A. I do not recollect of the fence; I recollect of two posts in the hollow that sometimes there was a rail laid across; we went out of that hollow to what is now Leavenworth street.

Q. What do you mean by that, that there was any sort of a fence on the north line or not?

A. I do not recollect whether there was or not; I recollect that there was two posts, a couple of bars across, and that is all I recollect. A. That was across the hollow.

127 Q. That was across the hollow?

A. Yes, sir.

Q. What hollow was that? Was that the east or west ravine that runs through these premises?

A. It was through the east.

Q. What kind of a fence was there on the east line of these premises, commencing at the northeast corner and going to the southeast corner of the premises, as they are now situated and described, if you know any?

A. I can recollect of the fence, but I do not know what kind of a fence.

Q. When did you first recollect of seeing the fence there?

A. About the same time that I do the west fence.

Q. Did you have anything to do with helping build that fence on the east line?

A. No; I do not think I did.

Q. That was from your first recollection, was it?

A. Yes, sir.

Q. On the south line, about where Poppleton avenue now is, what fence, if any, was there there, and what kind of a fence, and how far did it extend from the southeast corner of the premises now in controversy west?

A. It extended to the fence on the west street, at the southeast corner. It was a brush, and I think a part of it was woven with hazel brush and poles nailed onto posts and hazel brush were wired in between the rails. That is my best recollection of it.

Q. State if you know anything about a house being on the premises west of that west fence that you have spoken of that was not enclosed.

128 A. I do not recollect of a house now.

Q. You may state what you know about your father or any members of your father's family cutting wood off from those premises that were enclosed or unenclosed. If you know anything about that state when, during what years it was done, and by whom, if you know.

Objected to all this class of testimony as irrelevant and immaterial.

A. We went in there and cut wood there in the part enclosed up next to the prairie just as we wanted to haul out on the farm.

Q. During what years was this done?

A. I do not recollect.

Q. Was it done in 1870?

A. It was back of that, is my recollection.

Q. This way from that, was it 1871, 1872, 1873, 1874, 1875, 1876, and so on up?

A. I do not recollect of any cutting since 1870.

Q. Did you ever haul any off from it yourself?

A. Yes, sir.

Q. What years?

A. I don't recollect. I know I was a small boy; just big enough to drive a team; not big enough to load poles. I would drive the team and haul them and the hired man would load them and father unload or father would load and the hired man unload, and I would drive the team back.

Q. Who cut the poles?

A. Sometimes father and sometimes the hired man—the one that was at one end or the other.

Q. Do you know anything about anything of that kind having been done after 1870?

129 A. Yes; there was. I cut a load in there less than 18 years ago and hauled it home.

Q. Was that after 1873?

A. That would be 16 years ago. It would be hard for me to recollect. I have been driving a team ever since I was big enough to handle lines. I never paid any attention.

Q. Answer the best you know how.

A. I recollect, but I cannot tell what years it was. I know it was after we moved out on the Papio. We hauled poles and stopped out there, but I don't recollect the year.

Q. When did you move out on the Papio?

A. I think we have been out there 16 years. I think mother has been out there 12.

Q. That was since then, was it?

A. Yes, sir.

Q. What, if anything, do you know about a part of these premises having been cultivated at any time? State all you know about it.

A. There was a tract outside enclosure, I would think.

Q. Was that inside or outside the fence?

A. Outside the fence—on the east slope.

Q. Of what?

A. The middle hill—about two-thirds of the way up the hill and about the middle of the 17 acres.

Q. What was that cultivated in—pla-ted in—if anything?

A. We had potatoes in there one year, and I don't recollect what we had in it any other year. I know we farmed it one year, and I can just recollect going out there.

Q. Was that prairie or grubbed out of the timber?

A. That was grub land.

130 Q. What was there, if you remember, west of the west fence that you have told of? Anything in the way of cultivation?

A. I think there was three or four acres of timber, and the balance was prairie land.

Q. Was there any cultivated west of the west fence that you know of?

A. Yes, sir.

Q. What do you know, if anything, about your father pasturing those cows on his premises and inside of the inclosure made by the fence, and during what years was it done, if you know?

A. I remember the cows being pastured there, but I cannot recollect what years. I can remember of dr-ving them out and going after them. It was as long ago as I can remember.

Q. Was that before or after you moved out to the Papio?

A. It was before. We had an old white cow. I can remember the looks of that cow. We had two of them.

Q. What do you know, if anything, about your father having moved out—after having moved out, using that as a pas-ure or otherwise after he had moved out to the Papio?

A. I don't recollect whether they were used for pasture after we moved out there or not.

Q. State whether or not you used it as a pasture for pasturing your horses in there after you moved out to the Papio.

A. Yes; I used to go in there. We considered that our own property and used to go and camp on there.

Q. In what year?

A. It was back of 1870. I don't recollect exactly what years it was.

Q. After you moved to the Papio did you do that?

A. Yes, sir.

131 Q. You said some time ago that you moved to the Papio 15 yrs. ago?

A. I do not recollect exactly; but I could recollect if I could think a little while exactly. I know we moved out there a good many years ago. I can recollect certain transactions. I know we were living on the Papio when the old church burned down here. I can recollect such things as that; but what years they were I could not recollect.

Q. How old were you when you pastured your horses on those premises?

A. I think I was not 18.

Q. Were you 17?

A. I was 16 or 17; I don't recollect exactly which.

Cross-examined.

By Mr. WOOLWORTH:

Q. Did you haul wood from there at any other place than out to the farm?

A. Yes, sir.

Q. Where did you haul to?

A. When we lived in town.

Q. That was before you went out to the farm?

A. Yes, sir; a part of the time when we lived there and here too.

Q. Then you hauled wood to the place in town after you had moved out to the farm?

A. Yes, sir.

Q. How much did you haul out there?

A. What we wanted to use for posts and wood; I do not recollect, because we would fetch in hay, and if we sold it we would go

132 in there and cut until we got tired; we were only boys, and would do as we liked about it.

Q. You did it now and then, very much as it happened, did you not?

A. Yes; as we needed the stuff.

Q. Where did you bring the hay from?

A. From where we lived; out there.

Q. Can you tell us anything about how much you hauled into town?

A. No; I could not tell you how much we hauled at all.

Q. Did you begin to haul as early as 1870?

A. Yes; we hauled before 1870.

Q. How much before 1870?

A. I could not recollect; I know I was hauling when I was 8 or 9 years old. I know they would send me out with a team and there was a man at each end; one would load and the other unload.

Q. Did you haul any wood in from the farm?

A. We had another farm with wood on.

Q. Where?

A. North.

Q. How far?

A. About 12 miles.

Q. Did you haul wood in from there, too?

A. Yes, sir.

Q. How much did you haul in from there?

A. I could not tell you how much; thousands and thousands of cords have been hauled away from there.

Q. That was a large wooded piece up there?

A. Yes, sir.

Q. Most of the wood for the house came from up there?

133 A. No; most of that was cut into cord-wood.

Q. Was any of it hauled to the house?

A. Yes; we used to haul it to the house and then reload and sell it.

Q. The house was mainly supplied from the North farm, was not it?

A. Not materially so; we hauled one way and then the other.

Redirect examination.

By Mr. COVELL:

Q. Who lived at the house in town to which you hauled wood?

A. Mother.

Q. How long did she live here after you went out to the Papio?

A. I think about 9 or 10 years; I don't remember.

Q. About how long has it been since she moved out to the Papio, on the farm there?

A. I think 12 or 13 years; maybe 14; I cannot tell exactly.

Q. The wood which you hauled from these premises, this 17 acres, was that hauled and used at the house where your mother was?

A. Yes, sir.

Q. How much did you haul off from these premises in controversy, this 17 acres, up to the house where your mother lived and was used there?

A. We hauled off and on; some winters more and some not so much.

Q. The house where you mother lived was supplied with wood from this 17 acres?

A. Yes, and what was not saleable wood.

Q. When you brought the wood to where your mother

134 lived, you unloaded and reloaded and sold it in town?

A. Yes; we generally kept the green wood there to burn and sold the dry wood in small loads.

Q. You continued hauling wood from a year after you moved out to the Papio every winter from this 17 acres in controversy up to where your mother lived in town?

A. Yes, sir; until she moved out to the farm.

Q. That is what you answer, is it?

A. Yes; until she moved out on the farm; then we did not haul any more in town.

Q. State whether or not you continued to haul wood from this 17 acres out to the farm after your mother moved out.

A. Yes, sir.

Q. Has that been pretty nearly every winter until the timber was gone?

A. Until the timber was pretty well cleaned out; I have not been home for the last 7 years to amount to anything; but, of course, I go home once a month or once in two months, but I don't know anything about that business now.

Q. You have been doing for yourself for 8 or 9 years?

A. Yes; since I have been married and settled down.

Q. You are married; what age was you when you were married?

A. 23.

Q. Up to that time you continued to haul wood out there?

A. Yes, sir.

Q. How old do you say you are now?

A. 31 next August, I think.

135 Recross-examination.

By Mr. WOOLWORTH:

Q. You did not sell any of this wood taken off from the 17 acres, did you?

A. I don't recollect whether we did or not.

Q. Was it stove wood that you hauled in from there?

A. No; sled length.

Q. It was cut up at home and burned in the stove, was it?

A. Yes; what was not for posts.

Q. How large were the trees generally?

A. Some were pretty good sized trees.

Q. Tell us how large that would be.

A. I would think there were some hickorys that were a foot through.

Q. The trees you cut would generally range about a foot through and from that down?

A. Some were a foot through, probably; I could not tell you exactly, and from that on down to brush.

Q. Did you aim to cut the large trees or cut out just as you went?

A. Cut it just as we came to it.

Q. So you would clean a piece off and then go on and cut further, did you?

A. I do not recollect. We just cut wherever we found it, first outside and then inside the fence.

Q. You cut all the time on the edge of the wood land, did you not? You did not go into the woods, but cut up into the field?

A. We used to cut up into the field.

136 Q. You cut up into the edge of the wooded ground, did you?

A. Yes, sir.

JAY C. ROOT.

137 THEODORE GALLAGHER, sworn for the defendant, examined in chief by Mr. COVELL, testified as follows:

I have lived in Douglas county, Nebraska, since December, 1869, and have known the premises in controversy since the fall of 1870.

Q. You may state if you know what part, how much, of the premises in controversy were enclosed with a fence shortly after you first knew them; and, if any part, with what kind of a fence was it enclosed?

The plaintiff objects to all about the fence.

A. Along on the east line of that 80 there was a fence running from south to north, pretty near to the north as it would be now, and joined onto some trees and brush, and run down a gradual slope to the north; I presume to the north line of this 80.

Q. What was there on the south line of the present 17 acres?

A. There was a kind of a brush-tree fence, we call it.

Q. From what point and to what point did it extend?

A. It run westerly to somewheres about that knoll; there is a knoll in that land somewheres. I do not know just where, but it struck that knoll at some point.

Q. Where did it commence?

A. On the east line of the premises. It was all connected. No; I do not know where they commenced to build it.

Q. What, if anything, did you see of the fence extending on the south line that you have just described northward, and if there was any fence there to what point north did it extend?

A. In the first place, I thought you said north instead of south. You have asked me on the south where now Poppleton ave-

158 nue or a portion of it would be. There was a fence running somewheres near the middle of the land. I do not know just where, but it struck that knoll. The land de-cended from Hanscom place westward down to the hollow, then rises to a high knoll, then de-cends westerly, then rises west to another hill; there is a knoll there about like that in the middle of this 17 acres.

Q. That is between the two elevations?

A. Yes, sir; this fence runs somewheres on the south line, striking that knoll somewheres about the middle, as near as I can remember.

Q. The fence west of that knoll runs north—where does it go to?

A. There was no fence west of the knoll.

Q. Where was it?

A. It was on the knoll.

Q. Tell me about that.

A. That fence? There was a kind of a brush fence made of trees, what we call shiver de frees, I would call it, run from what I presume to be the south line to the north line—running north and, south across the country; that is my recollection.

Q. From the north end of that fence you have just described which run on the knoll to the northeast corner, what was that?

A. A similar fence, except on the east I saw it was partly boards.

Q. What was the character of the ground? Was it timber or prairie land that was inside that enclosure?

A. Mostly timber.

139 Q. What do you know, if anything, about Mr. Root or members of his family cutting timber inside of that inclosure?

A. I never saw any of them cut a stick of timber, to my knowledge.

Q. Did you ever see them haul any away?

A. I do not know that I have seen them haul any; I have heard of it, and that is all.

Q. What do you know about that part of the land west of this fence that runs northwesterly, west of that?

A. The west part of this 17 acres, I know the land.

Q. What kind of land is that?

A. Partially prairie; now and then a tree; sometimes more, but it has been grubbed and dug out.

Q. Do you know anything about that part of it having been cultivated?

A. It was cultivated along in 1871, 1872, and 1873.

Q. Who cultivated it?

A. I do not know; I could not tell you who done it.

Q. You say it was cultivated?

A. Yes, sir.

Q. Do you know whether or not Mr. Root put it into crops?

A. I have so understood it; I have not seen him do it; his men usually worked there.

Q. Do you know whether he had a hired man working there?

A. He told me that he was working for Mr. Root.

Q. Who did?

A. The hired man himself.

Objected to as hearsay.

Q. What do you know, if anything, about there being a house or shanty west of that fence that run north, and where was

140 it? State if you know anything about it.

A. There was a shanty there for a number of years.

Q. About what years did you first know of its being there?

A. I do not know as I can locate the year, but I would think it was somewheres along about 1874 and 1875—somewheres along in there.

Q. Who lived in it, if anybody, if you know?

A. At that time I do not know, but later I found out that a man named Pierce lived in it.

Objected to as hearsay.

Q. Who did you say lived there?

A. Mr. Pierce.

Q. When did you first know of Mr. Pierce living there, and in whose interest was he there, if you know?

A. In 1877, I would judge—I think, as near as I can——

The plaintiff objects to the witness stating that he has simply heard.

The WITNESS: I learned his name in 1877; he was there and I got acquainted with him, but not until 1877 to know who he was.

Q. In whose interest was he there, if you know?

A. I only know what I heard him say—he was there in the interests of Mr. Root.

Objected to as hearsay.

Q. Who authorized him, if you know, to go on the premises and remain there?

A. I do not know only what I have heard. He said he went there for Mr. Root.

Q. State whether or not you had charge of these premises for Mr. Root, and whether or not you gave him or any other
141 person authority to remain there to hold it for Mr. Root.

A. This was in after years.

Q. What authority was it, if you gave any authority to remain there for Mr. Root? What was the parties' names?

A. His name was Aikin.

Q. What was his given name?

A. I think it was Henry.

Q. What is the given name of this man Pierce, if you remember?

A. I think it was Cyrus B. or P. This has been so long ago I have forgotten.

Q. How long did Mr. Pierce live on these premises, within your knowledge?

A. He must have staid there five or six years.

Q. When was it that Mr. Aikin went onto these premises?

A. I think in 1879.

Q. How long did he live there?

A. He left the country in March, 1883.

Q. Did you answer that you put him on the premises, you as the agent of Mr. Root?

A. I only consented. Of course, I did not put him there. He had made other arrangements with this other gentleman that had left.

Q. State whether or not he was living in the same house after Mr. Pierce left that Mr. Pierce lived in.

A. Yes, sir; he occupied the same premises.

Q. Whereabouts on these premises is that house situated?

A. Just north of Poppleton avenue and not a great ways from where Mr. Root's house now stands.

142 Q. Pretty near?
A. Yes, sir.
Q. State about where the house in which Mr. Root now lives now stands, with reference to the lines east, west, north, or south of these premises in controversy.
A. This house that Mr. Root now lives in lies a little west of the old brush fence that run in there in 1870—that is, th-t run north and south.
Q. That—I understand you to say the brush fence that run north and south run a little east of where this house that Mr. Root now lives in stands?
A. Yes, sir.
Q. A little east?
A. Yes, sir.
Q. About how far from where that house now stands did you say that this house stood that Aiken & Pierce lived in?
A. Somewheres pretty near the same place. I could not tell unless I was there and came pretty close to it.
Q. Mr. Aikin lived there until 1884, did he?
A. Yes. In 1885 he left this country—in March.
Q. Who, if you know, has been exercising acts of ownership and what acts of ownership over the premises claimed?

Objected to as to what has been claimed. He must state what he has done in the way of ownership.

A. I do not know how to answer that question the way you put it to me. I have seen Mr. Root there and around there, both with hay and other truck.
Q. During what years?
A. I have seen him there for the last six or 7 years, off and
143 onn, all during 1880. Of course, living there myself, I saw him.
Q. How near did you live there?
A. Less than a quarter.
Q. From 1870 up to 1880—during any of the years from 1870 up to 1880—how often have you seen him on those premises?
A. I did not see him up to 1871 and 1872. I saw him, perhaps, also in 1873 quite frequently passing to and fro, and then I did not see him much there until I went up to work for Major Davis. I went and fixed up his house, and along in 1876, I guess, I saw him there once or twice or three or four times during the time I was there, and perhaps in 1877. I could not tell just what nor how.
Q. During all the years you have known these premises has Mr. Root claimed to own them or not?

Objected to as irrelevant and immaterial.

A. He has, so far as my knowledge goes.
Q. State whether or not during all of the years that you have known these premises and lived near them you have known of Mr. Woolworth, the complainant in this action, having occupied those premises in any way, shape, or manner.

A. I never knew them to occupy them since I have been here. I saw him on there once.

Q. Do you know anything about Mr. Root using the enclosure there as a pasture since you have known the premises? And, if so, state what you know about it.

A. He had some cows in there in the latter part of 1870, 1871, 1872, and 1873—along there. I could not tell you how long.

Q. In 1873, from that to 1876—in any of those years?

A. I would say somewheres in those years up to 1875 and 1876.

144 Q. After 1876 and up to, say, 1880 do you remember anything about his using it in that way?

A. I do not remember of his using it for a pasture. There has been some horses around in there, but I did not know whose they were. I have seen young Mr. Root in there quite often.

Q. Which one—the one on the stand?

A. Yes; Jay Root. I didn't make any inquiries.

Q. During what years was he there and what did he use it for?

A. Horses and mules.

Q. Did he have them inside of the inclosure or outside?

A. He had them in.

Q. That which was enclosed by a fence?

A. Yes, sir.

Q. How often did you see him there with horses or mules?

A. I could not say.

Q. Was any of that since 1880 that you remember of?

A. No, sir; he has been there since then.

Q. This is between 1876 and 1880?

A. Yes, sir.

Q. The fences that you have described around these premises—that part of it that was enclosed—how long did that continue to be there—that is, when did you last see this brush fence there and that board fence on the east side?

A. The board fence began to disappear pretty rapidly. Every farmer that went along there or anybody else, I guess, they took a board and post. I do not know just how long that board fence lasted, but it disappeared, anyhow, until this water works got it out on top of that hill and threw up a lot of dirt, and from then on things began to go.

145 Q. What year was that?

A. I cannot locate it.

Q. State whether or not the brush fence on the south line was there until Poppleton avenue was graded.

A. No; it disappeared—this fence.

Q. The brush fence on the south line going west?

A. I think there was some of that remaining there until 1883; I don't believe I could locate much of that fence, except by, perhaps, here a piece and there a piece, until the summer of 1883. The summer of 1883 a lot of men got in there and got to slashing and trimming up the whole country, and the landmarks then disappeared.

Q. You remember the year that Poppleton avenue was graded?

A. I remember it being graded, but without I have something to call my attention to the fact I would not know just what year it was graded; I knew the taxes; I think it was graded in the fall of 1886 and in the spring of 1887. I would not dare to say, but I know the taxes amounted to eight or nine hundred dollars.

Q. You may state whether or not any part of that brush fence on the south line, according to your best recollection, was there at the time Poppleton avenue was graded.

A. I could not say as to that, but perhaps a little before that they might have been parties from there, and a little while before Poppleton avenue was graded they got in there, somebody did, and kind of fixed up a little kind of half-way place to cross on, and I did not know who. This was done some time during the year 1883 and perhaps 1884.

146 Q. Was that place fixed up to cross on Poppleton avenue?

A. Yes; it would be pretty near in the street as it is now. It would not miss it very much.

Q. You spoke a moment ago about the time when the water works company put in their mains.

A. No, sir; I did not say anything about their mains.

Q. About what time was that; about what year was that—the throwing up of dirt?

A. I think the water works company came in a year after that occurred. I think they came the year following.

Q. When you spoke of the water works company throwing up dirt what did you mean—on Poppleton avenue?

A. Yes, sir.

Q. State whether or not about the same time they put in their water mains on 33d street.

A. That was done later.

Q. After this on Poppleton avenue?

A. Yes, sir.

Q. You said something a moment ago respecting the board fences on the east line beginning to disappear and disappearing rapidly about the time that the water company dug up the ground. Was that the year that they put in their mains on Poppleton avenue?

A. My recollection is that Holly did not put in any at all.

Q. This was not the present water company?

A. No, sir; the Holly Water Company; they got out there and threw up the ground.

Q. On what?

A. What is now called Hanscom place—the Hanscom farm.

Q. It was that year that the board fence began to disappear so rapidly?

A. Yes, sir.

147 Q. How much of that board fence was there; how far did it extend?

A. Originally it went the full length of the 80, except this piece of brush; I do not know how much there was; I did not measure

it; perhaps one-eighth, or maybe three or four hundred feet or yards of it; I did not measure it.

Q. How much of that board fence was there on the east line of this 17 acres—about how much?

A. Say, for short, perhaps two-thirds of it.

Q. Two-thirds of the length of the 17 acres?

A. Yes, sir; the east line.

Q. The east line of the 17 acres?

A. Yes, sir.

Q. And the balance was what kind of a fence?

A. This *Chevaux de friese* fence.

Q. State whether or not that *Chevaux de friese* extended from the north end of the board fence to the northeast corner of this tract.

A. No, sir, so far as I have been able to remember.

Cross-examined.

By Mr. WOOLWORTH:

Q. You say you saw me on that tract; when was that?

A. I think it was, my recollection is, along about June or July, 1883; I may be mistaken as to the year.

Q. What was I doing?

A. You were in a carriage, and two or three ladies with you.

Q. Just driving along there?

A. You were not driving when I saw you.

148 Q. What was I doing?

A. Standing still; the horses were still.

Q. Was I looking over the field?

A. Yes; I was plowing corn.

Q. Where were you plowing corn?

A. In my field which joins on the south.

Q. When you saw Mr. Root there what was he doing?

A. I saw him there with a load of hay and a wagon; I never paid much attention to him; I saw him there a number of times with a load of hay, with his horses tied to the wagon, and sometimes he would bring his horses over to the well to water them and go back.

Q. Did he cut the hay on the ground?

A. No, sir; there was not a pound of hay on that land.

Q. He was hauling hay to town, was he?

A. I suppose so; I did not ask him.

Q. He was at that or something like that from the time you saw him there?

A. Generally; I have seen him a number of times with calves in the wagon—supposed to be calves.

Q. Just driving in there?

A. He seemed to stop there to run in in the morning or night.

Q. How long would he stop?

A. He has stopped there over night a great many times, camping there.

Q. Camping out?

A. Yes, sir.

Q. Generally how long would he stop?

A. I would not dare say any daytime, because I did not
149 pay much attention to him in the daytime.

Q. It was temporary as a person would stop driving along there?

A. He would camp over night.

Q. Aside from camping?

A. Otherwise, perhaps, I would not notice it so particularly, because he would come there to water his horses night and m-rning.

Q. This west fence was a brush fence the whole length of it, was not it?

A. Yes, sir.

Q. It was not any post or boards on it?

A. To my recollection there was not.

Q. That was about the south fence, was not it?

A. The south fence. My recollection is that it was all brush. There might have been a post now and then; I would not be able to designate now. My recollection is that it was most all brush.

Q. You did not see Mr. Root pasture any cows there later than 1870 or 1871?

A. No; I don't remember any cows being in there—what I mean to say is that I know there were cows in there, but I don't know whose they were.

Q. You don't know whether they were Mr. Root's or not?

A. No; I had no means of knowing.

Q. You say you saw young Root pasturing horses in there. How many horses did you see him have there at a time?

A. I don't think I ever saw more than two or three, and sometimes a couple of mules, and sometimes a couple of horses.

Q. How long did he keep them there at a time?

A. That would be rather hard for me to answer. I could
150 not say right off. I didn't pay much attention to it.

Q At the time that he did that, were the fences in good order, so as to make a good enclosure for cows and horses?

A. At times it would be and times it would be broken in, and there would somebody patch it up and it would go along another week or two or three days, and the stock would get out, and so it would go. I do not know that you could say it was kept first class all the time. Like many other pastures of that character, it was as I stated.

Q. How late did you say the young man pastured his horses and mules there?

A. I do not know that I can locate the years particularly. It strikes me that he had a good deal to do with it the years that I done some work out there for Jim Davis, and that runs in my mind since 1875 and 1876.

Q. Was it the same young man that testified just before you did?

A. Yes, sir.

THEO. GALLIGHER.

Here the taking of testimony was adjourned until Tuesday, the 30th, at 2 o'clock p. m.

151 OMAHA, NEBRASKA, *April 30th*, 1889.

The taking of testimony was continued pursuant to adjournment, the same parties appearing on either side. Testimony was taken as follows:

SAYRS G. KNIGHT, sworn for the defendant, examined in chief by Mr. COVELL, testified as follows:

I am a civil engineer; live at 2205 Webster street, Omaha, Nebraska.

Q. You may state what business you were engaged in in 1887.

A. I was employed by the city in charge of grading various streets in Omaha.

Q. State if you know when what is known as Poppleton avenue, in the city of Omaha, was graded on the west end.

A. The contract was from 20th to 36th street and commenced, I think, in June, 1887, and finished along some months later.

Q. Who did the surveying on that street?

A. I did.

Q. You may state if you know the premises known as the 17 acres, the north 17 acres of the west half of the northwest quarter of section 28, township 15, range 13, sometimes called Oakhurst; and, if so, what you saw there upon any part of that land in the shape of a building when you made the survey.

A. I do not know that I can locate the place by reference to the section; I know a place called Oakhurst, between 33 and 36th streets, on the north side of Poppleton avenue; there was a small one-story building near the southeast corner on Poppleton avenue at the time the survey was made.

152 Q. What time in 1887 was that?

A. I think it was in June.

Q. Describe the building.

A. It was a small one-story building; my recollection is that it had a round roof, something like a railroad car.

Q. State about where that tract of land that the building was on was situated.

A. It stood partly in an alley 125 feet west of 33rd street and very slightly in Poppleton avenue, a foot or so.

Q. The balance of it on this tract of land?

A. I am not certain whether any of it was out of the alley to amount to anything; whether it was out of the alley wider than the alley or not.

Q. The balance, except one foot, stood in that alley, as near as you could ascertain?

A. Yes, sir.

Q. Do you know anything about this tract of land prior to that time?

A. No, sir.

Q. Do you know whether there was anybody living in that house at that time?

A. Yes, sir.

Q. If you know the names of the persons, state them.

A. I do not.

Q. Can you state when the grading was finished about, in the year of 1887, of Poppleton avenue?

A. Not very well without reference to the notes; I think it was possibly not until November or December.

Q. You may state whether or not, in the grading of Pop-
153 pleton avenue, it was necessary that that house should be removed and whether or not it was removed.

A. It was removed; yes, sir.

Cross-examined.

By Mr. WOOLWORTH:

Q. There was not but one house on the tract?

A. I don't remember of any other house on the tract then.

Q. Did you grade any of the streets running north and south?

A. Yes, sir; where they were cut down and filled up some.

Q. What streets were those you graded?

A. We graded 35th and 34th streets on that tract.

Q. Did you grade the alley any?

A. Yes; the same way, and also approaches.

Q. How far back did those approaches run?

Objected to as immaterial and irrelevant.

A. According to the elevation on Poppleton avenue, so as to give a grade of 12 feet in a hundred. There is a city ordinance that regulates it.

Q. How far north of Poppleton avenue did you grade 35th street?

Objected to as immaterial and irrelevant, and defendant asks that this objection apply to every question.

A. I could not say without reference to books exactly, but would say about 200 feet.

Q. How was it with the next street east?

A. The next street east was 24th, and I would think that was full as far—fully 200 feet. It did not grade the whole width of 34th-
street approach, it being in a kind of a ravine. We only
154 graded one side of it, so as to make a connection, so that a team could go up or down if necessary.

Q. On 33rd street there was no grade of any consequence?

A. There was a foot cut, I think, on the south side and about a foot hill on the north side.

Q. This grading was done by the city?

A. Yes, sir.

Q. I meant the grade of Poppleton avenue and of these streets you have just mentioned.

A. Yes; that is the way I understand it.

SAYRS G. KNIGHT.

155 THEODORE GALLAGHER, recalled for the plaintiff, by consent of parties, examined in chief by Mr. COVELL, testified as follows:

Q. State if you know anything about a house upon the 17 acres in controversy in this action, somewhere near the southeast corner of it; and, if so, what do you know about it and who lived in it.

A. There was a small house there nearly as this gentleman has described it; a little piece in the street. They filled up against it, and of course he had to move it away from there.

Q. When did you first see the house there?

A. I saw the house there the latter part of the fall of 1885.

Q. Was any person living in it?

A. Yes, sir.

Q. Who was it?

A. His name was Upton.

Q. How long did he live there, if you know?

A. He was there during all that winter of 1886 until the grade run him out and when they filled the dirt up against his house; that would be in 1887, in the fall.

Q. You may state if he lived there in the house at the time you knew of it first in 1885 up to the time that grading was done on Poppleton avenue in 1887.

A. I did not know anything to the contrary.

Q. State whether you saw him there.

A. I saw him there during the time off and on.

Q. Do you know in whose interest he was living upon that land? And, if so, state it.

A. I understood he was there in the interest——

156 Q. State what kind of a building it was, and where it was situated on that piece of land.

A. I did not know whether it struck the alley, but perhaps it did. I know that it struck the street. The dirt was rolled up against a bank and banked him up. He had a house and barn there; considerable of a house. I would think perhaps 20 or 30 feet in that neighborhood. He had a barn, I would judge, 13 by 20 feet.

Q. What became of the house and barn?

A. He had to move them away from there.

Q. When?

A. In 1887.

Q. Spring or fall?

A. Fall.

Cross-examined.

By Mr. WOOLWORTH:

Q. Do you know just the time?

A. I don't know just the time it was built, but some time in the latter part of 1885. I do not know just what week or month.

Q. Is that the same house that the last witness spoke about?

A. Yes; that is the same house.

Q. Was it painted?

A. I am sure I could not say whether it was or not. I do not remember.

157 ALLEN ROOT, the defendant, recalled in his own behalf, examined in chief by Mr. COVELL, testified as follows:

Q. You may state whether or not you ever had in your possession the original sheriff's deed from Sheriff Hilemon to Haiman Glass for the 16-acre tract in controversy.

A. No, sir.

Q. You may state whether or not before the filing of the plaintiff's bill in this cause you had any knowledge of a deed for the premises in controversy from Oliver P. Morton to William S. T. Morton, or that a deed had ever been made for the premises in controversy, and any knowledge of the recording of that deed.

Objected to as immaterial and irrelevant.

A. I had no knowledge of the deed and learned of the record of the deed since the commencement of this suit.

Q. You may state what, if anything, you know about a small house and barn being near the southeast corner of the premises in question, when it was built and who occupied them, if you know.

A. In 1885 there was a small house and barn built there and were occupied by a man named Upton and his family.

Q. In whose interest were those parties occupying that house?

Objected to as irrelevant, immaterial, and incompetent.

A. In my interest and by my permission.

Q. How long were those buildings there, and how long were they occupied by those parties?

A. They were there until 1887, some time in the fall, and were occupied all the time.

158 Q. You may state if they were occupied from the time when they were built up there until the fall of 1887 by this man Upton and his family.

A. They were. There might have been another man with him at one time. I think there were two families at one time, but Mr. Upton remained there. I might be mistaken as to the two families. They had two teams there, I will say that.

Cross-examined.

By Mr. WOOLWORTH:

Q. What was Mr. Upton's first name?

A. I cannot tell. I do not know that I ever knew.

Q. Where does he live?

A. I do not know. I have not seen him since he went from here.

Q. What was his business?

A. He was teaming around town with one team, and two when they had two there.

The defendant offers in evidence a certified copy of the record of a deed from John C. Hileman, sheriff of Douglas county, to Heman Glass for the premises described as follows:

Beginning at the northwest corner of the northwest quarter of section 28, in township 15 north, of range 13 east, and running thence south 8.05 chains, thence south 85 degrees east 20.10 chains, thence north 9.70 chains, thence west 20 chains to
159 the place of beginning, containing 17.75 acres, the tract of land being in Douglas county, Territory of Nebraska.

Objected to as immaterial.

A copy of the deed is hereto attached, marked Exhibit B.

The defendant offers in evidence a certified transcript of the pleadings — proceedings in the case of Heman Class *vs.* Roswell G. Pierce, in the district of the then Territory of Nebraska, together with a certified transcript of the attachment and order of sale, sheriff's notice of sale and affidavit of publication thereof, and sheriff's return of the order of confirmation of sale, and also of an execution with the order of sale issued out of the same court on the 21st day of July, 1860, over the sale thereof by E. B. Chandler, clerk, the notice of the publication of the same by the sheriff thereunder, the affidavit of attachment thereto as proof of publication, and the return of the sheriff, John C. Hileman, to that execution, with order of sale, together with the confirmation of sale thereof by the court presided over by A. Hall, judge, in the case of Heman Class *vs.* Roswell G. Pierce, in which the tract of land was described as follows, and was attached and sold to Heman Glass by the said Sheriff Hiland, being a tract of land situated in the N. W. ¼ of the N. W. ¼ of sec. 28, 15, 13, and bounded as follows: Beginning at the N. W. corner of said section, thence south 8.5 chains, thence south 85 deg. east 20.1 chains, thence north 9.7 chains, thence 20 chains west to the place of beginning, and containing 17.75 acres, more or less, which is designated as lot 3, said land being situated in Douglas county, Nebraska; said transcript containing also all proceedings in that case in that court so far as can be ascertained from the records of that court.

Objected to as immaterial and irrelevant.

Copies of the same are hereto attached, marked Exhibit- "B B," "B' B' B," "B' B' B B."

160 OMAHA, NEB., *May 10th*, 1889.

The taking of testimony was continued pursuant to adjournment, the same parties appearing on either side.

FRANK E. MOORES, recalled for the defendant, examined in chief by Mr. COVELL, testified as follows:

Q. State if, as clerk of the district court of the third judicial district of the State of Nebraska, in and for Douglas county, you have made an examination for the files in law case No. 476 C, entitled Oliver P. Morton *vs.* Roswell G. Pierce, Thomas A. Jackson, Jen-

nings, M. Palmer, and Eleaser Noble; and, if so, what search you made and what was the result of such search.

A. I searched in the vault where the files should be, and could not find them. I had my filing clerk go through the files in the office in adjudicated files, and he could not find them, and, to the best of my belief and knowledge, they are not in my possession.

Q. You may state whether or not in that search you found in that case any writ of attachments or any return of the levy of the writ of attachment upon any real estate in that case.

A. No, sir; I did not.

Q. Did you find any record, either complete or otherwise, of a writ of attachment in that case or a levy either of or upon land described as follows: Beginning at the northwest corner of section 28, in township 15, range 13, in Douglas county, Nebraska, thence south 8 and $\frac{5}{100}$ chains, thence south 85 degrees 20 and $\frac{10}{100}$ chains, thence north 9.70 chains, and thence west 20 chains to the place of beginning, or any return of the sheriff of the levy of such writ of attachment thereon or record thereof, complete or otherwise?

161

A. I did not.

Q. Is that a certified copy of any part of the records that are in your office and under your control?

A. It is a certified copy of the entries on the appearance docket C, in case 43, entitled Heman Glass *vs.* Roswell G. Pierce.

The defendant offers the paper referred to in evidence, the same being hereto attached, marked Exhibit —.

The cross-examination of this witness is waived. The signature of this witness to this deposition is waived by both parties.

162 JAMES F. GARDNER, sworn for the defendant, examined in chief by Mr. COVELL, testified as follows:

I reside in Omaha at the present time, and came to this State from Indiana.

Q. At what time did you move from the State of Indiana to the State of Nebraska?

A. I brought my family here in the spring of 1866. I had been here before that myself for a short time.

Q. You may state in what business you were engaged while a resident of the State of Indiana.

A. In the practice of law.

Q. As such practitioner of law in the State of Indiana you may state whether or not you were acquainted with the laws of the State of Indiana governing the conveyance of lands; and, if so, you may state what your knowledge thereof was and is.

A. I was acquainted with the statutes in relation to the conveyance of real estate.

Q. You may state whether or not the statutes of the State of Indiana, in the conveyance of real estate, required the signatures of the grantees to a deed to be affixed by any person on such deed.

Objected to as immaterial and irrelevant and incompetent.

A. Not when the deed was acknowledged by the proper officer.

Q. You may examine this paper, which is a certified copy of a record of a deed made by Oliver P. Morton and Lucinda M. Morton, his wife, to William S. T. Morton for certain real estate,
163 being the real estate in controversy in this case, and state whether such deed is executed and acknowledged according to the laws of the State of Indiana governing the conveyance of real estate.

Objected to as immaterial, irrelevant.

A. I think the deed is executed and acknowledged according to the requirements of the statutes of Indiana as they were when I was acquainted with them.

Q. You may state if you are familiar with the statutes of the State of Indiana from 1847 to 1870, inclusive; and, if so, how you became familiar with them.

A. I was familiar with them up until that time—from the time of the revision in 1838 and the revision of 1852 and the statute of Gavin & Hord of 1852. I was familiar with them and has them in my possession, and was engaged in no other business than the practice of law, and was probably as familiar with them as men ordinarily are that are engaged in that business of law.

Q. You may state whether or not you are at present familiar with the statutes of the State of Indiana governing the conveyance of real estate up to and including the revision of Gavin and Hord and the supplement thereto, edited by Daniel Davis, issued and published in the year 1870; and, if so, if you have made an examination lately of such statutes.

A. Yes; I am familiar with the statutss up to that time, and with the provisions of them in regard — the conveyance of real estate, I think.

Q. State whether or not, up to and including the year 1869 and up to the year 1870, the statutes of the State of Indiana
164 required a witness to a deed if it was acknowledged before an officer having a seal.

Objected to as immaterial and irrelevant.

A. So far as my knowledge goes they did not. The statutes require, where there was no acknowledgment, before a deed should be recorded that there should be attesting witnesses and proofs of the execution of the deed in order to entitle it to record; if executed before an officer having a seal they did not so require.

The defendant offers the certified copy of the deed referred to in evidence, being the same deed submitted to witness and identified.

Objected to as immaterial and irrelevant.

The same is hereto attached, marked Exhibit —.

Q. You may examine these books and state what they are.

A. I find two volumes—first and second volume—of the Statutes of Gavin and Hord. I recognize them as the statutes of the State of Indiana. They are recognized by the courts of that State as

such. The third volume is a supplement to the Statute- of Gavin & Hord, by Davis, and stands in the same position with regard to the courts that the other two volumes do, the three being the statutes of the State of Indiana at the time they were issued.

The defendant offers in evidence volumes one and two of the Statutes of the State of Indiana, being a revision made by Gavin & Hord, and also volume three, a supplement thereto, edited by Edwin A. Davis, and particularly that part thereof of the statutes therein contained governing the conveyance of real estate, together — the certificate of the secretary of state of the State of Indiana, attached to each volume thereof, and attested by the great seal of the State of Indiana, and, in connection therewith, the certificates of
165 the prior secretaries of state of the State of Indiana, attached to said three volumes of the statutes of the State of Indiana, printed and found in these three volumes.

Objected to as immaterial, and that these volumes are not properly certified to.

The cross-examination of this witness is waived by both parties.

The signature of this witness to this deposition is waived by all parties.

The defendant offers in evidence a lithograph map of the city of Omaha and its surroundings, published by Byron Reed & Co., in the year 1870, showing the lands in controversy, with the name of Allen Root printed on the said land, and which said map was then in use and circulation in the city of Omaha, it being admitted that said map was then in general use and circulation in the city of Omaha.

Received without objection, and the same is hereto attached, marked Exhibit "B B B B B."

WILLIAM B. MILLARD, sworn for the plaintiff, examined in chief by Mr. COVELL, testified as follows:

I reside in Omaha, Nebraska, and have resided there since a child.

Q. You may state if you know the premises that are situated west of that—used to be known as the Janscom farm; between that and the poor farm and what was formerly known as the Jane E. North tract.

A. I do not know about the Jane E. North tract. I know all the country east of the poor farm and what is now known as the Hanscom park.

Q. West of Hanscom's farm?

A. Yes; the Megaath farm was not it.

Q. Do you know where Poppleton avenue is now situate?

A. Yes, sir.

Q. Do you know where it runs to on the west—to what street or streets?

A. I think Poppleton avenue comes out at the north corner of the poor farm, does it not?

Q. Have you been along Poppleton avenue since it was graded?

166 A. I was out and all through there with Mr. Connell, but whether we were on Poppleton avenue or a street that turned at the northeast corner of the poor farm and came through a street that was opened soon through that belt of woods there; that is what I think was Poppleton avenue; it may not be.

Q. Do you know whether it was known as Pacific street or Poppleton avenue?

A. I do not know.

Q. Do you know the piece of land that lies south of that street that you have just named?

A. Yes, sir.

Q. You may state when you first knew that tract of land.

A. I think I have known it for 25 or 26 years; 24 years, I would say, anyway.

Q. You may state if you know of Mr. Root or any of the members of his family cutting and hauling wood or poles from that land; and, if so, about when?

Objected to as immaterial.

A. It was way back when I was a boy somewhere from 5 to 9 years old; 10 years old, maybe; Mr. Root and his son went out there to cut some poles and I went on a sled with them, and they cut the timber and brought it back.

Q. About what year would that be?

A. That would be from 1867 to 1871; about somewheres along there.

Q. Somewheres between those days, would it?

A. Yes, sir.

Q. After 1871 did you know of any such thing being done

167 in wood or poles, any wood or poles being cut or hauled off?

A. No; not from memory.

Cross-examined.

By Mr. WOOLWORTH:

Q. How many days did you go out there with them?

A. There was once in particular that I remember; only once that I have any positive remembrance of.

Q. How many loads did they haul in that day?

A. I only went on one trip.

Q. That is all you know of their hauling, that one load?

A. Yes, sir.

Q. What kind of timber was that that they hauled?

A. It was poles; they cut the trees right there.

Q. About how large were the trees?

A. I do not know as I know; I got up on top of the poles and rode home on them; I was not paying any attention to the trees; I went for the ride.

Q. How large a load was it that they hauled in?

A. It was not a very large load, as I remember; it was on bob sleds—sleighing. I got up on top of the poles and rode home; they had two horses and a sleigh.

Q. Can't you tell how high the load was?

A. I suppose it was probably 3 feet or 3½ feet above the sled, as I remember it; it was a good load of poles.

Q. How many should you think there were?

A. I have no idea.

Q. Do you know where Mayne addition is?

A. I know where—it is called Mayne place, on Leaven-
168 worth street, where the north line is, but I don't know where the south line runs to.

Q. That was all wooded ground, Mayne place, at that time?

A. Yes, sir.

Q. Do you know whether those poles were cut on that place—that piece of ground now known as Mayne place?

A. No; I do not think they were, as far as I recollect Mayne place. They were cut in what—I will tell you; I can describe it to you. There was an old road turned right there on the prairie; that was before Bartlett Smith's house was there; and we were up on top of the hill, and turned west and went down into the timber, and there was a little belt—a few trees—on the east side of the road.

Q. You went through the timber and started up to the poor-house?

A. We went down into that corner—down into the woods some place.

Q. Was that on the south or north side of Poppleton avenue?

A. It was on the south side of Poppleton avenue as I have got the location in my mind of Hanscom place. Poppleton avenue is way north of where that best of woods used to be.

Q. Poppleton avenue was north of the tract that you cut the timber from, was it?

A. Yes; as I have got Poppleton avenue. I don't know Poppleton avenue really after you get west of Park avenue. I don't know how it goes on through west there exactly.

Q. You know about where it crosses Park avenue?

A. Yes; I know right where it crosses Park avenue.

169 Q. And this timber was cut south of that, was not it?

A. Yes, sir.

Redirect examination.

By Mr. COVELL:

Q. You some time ago, in your direct examination, said that you came with some gentleman to the northeast corner of the poor farm—came directly east down the street on the north line of this land?

A. I do not know about this land. I stated I was out there with W. J. Connell once looking at his property, and we went up to the poor-house and turned east, if I remember right, at the northeast corner of the poor farm. I think that was Poppleton avenue.

Q. Do you know what street that was?

A. No. I thought that was Poppleton avenue.

Q. That is Pacific street. You may state whether the poles that you have stated were cut upon the land out there, how far between that street and the next one running east and west—how far south of that street on the south line of Mayne street was it that those poles were cut. That street on the south of Mayne place is Pacific street and runs from the south line of the poor farm directly east.

A. I do not remember the lay of the ground well enough to state that positively, but I would say a couple of blocks over to where the old road used to turn and run west to get into that belt of woods.

Q. Did you cut on the north or south side—were the poles cut on the east or west side of the old road that you said turned to go down on the west side?

170 A. On the east side there was only 15 or 20 feet of timber.

Q. The poles were cut on the west side of that old road?

A. Yes, sir.

Q. How far south from a line running directly west from Hanscom's northwest corner?

A. I cannot say without a map. I don't know where that old road runs. That is what is the matter with it without a map. If I had an old town map I could tell.

Q. How far was it off from that old road that the timber was cut?

A. The old road run down into the timber due north until it turned around the gulch and west west. We drove along there a little ways and then *dor*ve down into the timber—I would think not over a block or two. They were cut in there in different places.

Q. How far was it above that the turn was made around the gulch?

A. I would think that that road was about 4 blocks long, and I would think that we went south on that road about a block.

Q. That is the road running south—this old road?

A. Yes, sir; I guess so. That is too *rigl*h for my blood, locating these old-time roads in those new additions.

Recross-examination.

By Mr. WOOLWORTH:

Q. What was that road called?

A. It was called the old county road to go to the Griffin farm—the old Papillion road.

Q. The old Bellevue road we called it sometimes?

A. No; not such; the Bellevue road was south and this

171 road went out to the poor farm.

Q. Did you and Mr. Connell follow a road due east from the northeast corner of the poor farm?

A. Yes, sir; that is my recollection.

Q. When was that?

A. It was a year ago last winter.

Q. Had the road ever been worked?

A. Yes; they had been grading and made it in some shape. This road that runs east and west was pretty bad. J. J. Brown was with me and he attempted to get out 2 or 3 times.

Q. The road was so rough that he could not get out?

A. No; he wanted to get out because it was so rough.

Q. How near was the Connell property to the street that you say you crossed on?

A. I think the Connell property that he showed us at that time was lying on that street; it lay south of that street.

Q. That is, this street that you speak of was the north line of Connell's land, was not it?

A. Yes; that is the way I recollect it?

Q. If Mr. Connell's land went to Poppleton avenue it was Poppleton that you crossed over on, was not it?

A. I don't know anything about Poppleton avenue.

Q. You say you did not come across from the poor farm east on the street that Connell's land was on?

A. That *us* as I recollect it.

172 Redirect examination.

By Mr. COVELL:

Q. Was the timber north or south of that street that you came through that you cut?

A. South.

Q. You are sure it was south, are you?

A. Yes; I guess I am. If I could see a map a minute I could tell you.

Q. Mr. Connell's land fronts on the north on Poppleton avenue?

Mr. WOOLWORTH: Was not it on Poppleton avenue that you came across?

A. I think it was. I have thought right along that Poppleton avenue was the road that we crossed to the poor farm. You say it is Pacific street.

Mr. COVELL: Are you certain whether that load of poles were cut north or south of that street that you came through on with Mr. Connell?

A. I am not certain about this Connell business, but I am sure that we turned south when we went down that old road at that time, but I don't remember where these old additions are now.

WILLARD B. MILLARD.

OMAHA, NEBRASKA, *May 4th*, 1889.

The taking of testimony was resumed pursuant to adjournment, the same parties appearing on either side, and the following proceedings were had:

HIRAM AVERY, sworn for the defendant, examined in chief by Mr. COVELL, testified as follows:

Q. Where did you live in 1868, 1869, 1870, and 1871?

A. In what is called Hanscom park.

Q. Up until what time did you live there?

173 A. Until the fall of 1878. I think I staid on the place something like 11 or 12 years.

Q. Do you know the premises on which Allen Root now lives?

A. Yes, sir.

Q. How long had you known those premises before you moved away from Hanscom place?

A. We knew the premises frequently, but did not know who they belonged to during that time.

Q. You may state what you know, if anything, and what you saw, if anything, as to the building of a fence or fences upon the south line of these premises, about where Poppleton avenue now is.

Objected to all the testimony in regard to fences as immaterial, irrelevant, and incompetent.

A. I remember of seeing brush cut through there, and fell over in the form of a fence.

Q. How far did that extend from the southeast corner of the premises west?

A. I could not say exactly. It went over quite a distance west. I do not recollect how far.

Q. Do you think it extends two-thirds of the way to the poor farm?

A. I think it did; fully that far.

Q. State what, if anything, you remember about *their* being a fence on the east side of the premises, running from the southeast corner northward.

A. I remember of seeing a board fence there and brush a part of the way.

Q. Was the brush connected with the board fence?

A. Yes, sir.

Q. What years did you see that fence there last?

A. I think it was in 1872 the last I saw of it that I noticed.

174 Q. You may state what you know, if anything, about a fence being upon the north side of the premises, running from the northeast corner westward; and, if so, how far did that extend, to the best of your recollection, west?

A. I remember of seeing it there. I could not say exactly how far it run. I took a glance at it; that is all.

Q. State what, if anything, you know about there being a fence extending southward from the west along to the west end of the south fence.

A. I do not remember of there being a fence on the west end at all; we were not over that way so much.

Q. Do you know anything about Allen Root or any of the members of his family cutting timber off from that piece of ground concerning which I have been inquiring?

A. No; I do not.

Q. Do you — anything about Mr. Root or any of the members of his family cultivating any portion of those premises?

A. No, sir. I do not know any of his family. There was a piece cultivated in there. I do not know whether Mr. Root or some one else cultivated it.

Q. You never saw any one cultivating it?

A. No, sir.

The cross-examination of this witness is waived.

HIRAM R. AVERY.

The defendant offers in evidence a certified transcript of the testimony of J. M. Ragan, O. B. Seldon, and Nelson Hartgrove, taken in the case of Oliver P. Morton, complainant, *vs.* Allen Root, respondent, No. 40 B, in the circuit court of the United States, duly certified. The same is hereto attached, marked *the same is hereto attached, marked* Exhibit "C."

175 FRANK E. MOORES, sworn for the defendant, examined in chief by Mr. COVELL, testified as follows:

Q. What official position do you occupy?

A. I am clerk of the district court of the 3rd judicial district of Nebraska.

Q. As such, have you charge of the records and files in that office?

A. Yes, sir.

Q. State whether or not you made a search for the files in the case of William Wade *vs.* Jane E. North and Horace Green in your office; and, of so, what was the result of such search.

A. The files are missing. We hunted all over, and cannot find them.

Q. Did you find anything there except the decree?

A. That was taken from the journal. So far as the files were concerned, we did not find the files.

Q. What did you find?

A. This certified copy which I have given you, which appears on the journal.

Q. Is this a certified copy?

A. Yes; it is.

The defendant offers in evidence the copy of the record above referred to.

Objected to as immaterial and irrelevant.

The same is hereto attached, marked Ex-ibit "D."

The cross-esaminati-n of the witness is waived.

FRANK E. MOORES,
Clerk District Court, Douglas Co., Neb.

The taking of the testimony is adjourned until Thursday, at 2 o'clock.

176 OMAHA, NEBRASKA, *May 20th*, 1889.

The taking of testimony was continued pursuant to adjournment.

B. E. B. KENNEDY, being duly sworn, examined in chief by Mr. COVELL, testified as follows:

Q. State if you were counsel for Allan Root in the suit of Oliver P. Morton against him in the United States circuit court for the district of Nebraska from 1870 to 1873.

A. I was.

Q. State if you were his counsel and attended to that case for him from its inception to its close.

A. I believe I did.

Q. You may state whether or not during the progress of that suit it ever came to your knowledge or any suggestion of that fact that Oliver P. Morton prior to the commencement of that action had conveyed the property in that action to one William S. T. Morton.

Objected to as immaterial, irrelevant, and incompetent.

A. I am not able to recollect the fact of having known that fact of any conveyance of the kind until my attention was called to it recently.

Q. You may state when your attention was called to it.

A. Recently.

Q. It was the first time that you had ever known or it had been suggested to you that the property in controversy in that action had been so conveyed to William S. T. Morton?

177 Objected to as incompetent, immaterial, and irrelevant.

A. I think it was the first time; at least I have no recollection of ever having known it before.

Q. Then, according to the best of you- recollection and knowledge, no suggestion of that fact was made during the progress of the case, was there?

Objected to as immaterial, leading, and putting the answer into the witness' mouth.

A. I am quite certain that no suggestion was made of that fact at any time prior at least to the decision of that case and entry of the decree.

Cross-examined.

By Mr. POPPLETON:

Q. Who was associated with you in that matter—in that suit—as attorney?

A. I don't recollect as any on- now.

Q. Can you make any positive statement on that subject as to whether any one was associated with you or assisted you in the defense of that action?

A. Mr. Townsend may have been my partner at that time, but I

do not think he took any very active part in the case if he was; but I am not sure about that, because I do not recollect that exact date when we commenced or our partnership ended.

178 Q. While you and Mr. Townsend were associated is it not true that Mr. Townsend in your absence gave a great deal of his attention to questions of law and was he not inclined to a careful and thorough study of questions of law?

Objected to — immaterial, irrelevant, and incompetent.

A. He was especially good in consultation in the office.

Q. Is you- recollection at all distinct as to the latters and *and* facts and questions transpiring and arising and transpiring at this time in that controversy?

A. Yes, as to the questions at issue and the taking of proof and the hearing of the case before the circuit judge are quite distinct.

B. E. B. KENNEDY.

The signature of this witness to this deposition is waived by both parties.

ALLEN ROOT, recalled, examined in chief by Mr. COVELL, testified as follows:

Q. In the testimony of some of the witnesses that have been produced here, and noticeably the one Knight, a statement was made that there was an alley somewhere near the southeast corner of the property in controversy, and that the building occupied by one Upton stood partly in the alley. You may state whether or not you had ever laid out any streets or alleys in the property in controversy and whether or not the city of Omaha had laid out any streets and alleys on the property in controversy.

179 Objected to as immaterial, irrelevant, and for the further reason that one branch of it calls for proof of facts which can only be established by record testimony or public officers, and it is not therefore the best evidence.

A. The first part of the *w*uestion—I never laid out any stre-ts or alleys and the city of Omaha never laid out any to my knowledge.

Q. If there are any streets or alleys laid out there how lately were they put on that property?

A. There was no visable evidence of any until 1887.

Q. You may state, if you remember, where the building described by Mr. Knight stood; and, if so, you may state whether or not that building was on the property that you claimed to own.

A. The house is on the east of the alley and the barn was in the alley nearly all of it.

Q. Is that part of the property which you claimed to own?

A. That is the property.

Q. Now, if there are any alleys or streets laid out upon the property or any part of the property in controversy in this action which you claimed to own, who laid them out or put them there, is you know?

A. I do not know.

Q. Was this building occupied by Mr. Upton as your tenant?

A. It was.

Q. When did he move off from the premises, if you know?

180 A. It was in the fall of 1887. I cannot state the month. It was after they commenced grading Poppleton avenue.

Q. About what year was it that Mr. Upton went on there as your tenant?

A. 1885.

Q. Prior to him who occupied the building on the premises as your tenant?

A. A man named Akin next preceeded him and next preceding him was a man named Pierce.

The cross-examination of this witness is waived.

The signature of this witness to this deposition is waived by all parties.

With this the testimony closed for the defendant.

181 EXHIBIT A.

Glass to Root.

In consideration of five hundred dollars to us paid, the receipt whereof is hereby acknowledged, we, Heman Glass and Lucy G. Glass, his wife, of the county of Douglas and Territory of Nebraska, do hereby sell and convey to Allen Root, his heirs and assigns, of the county of Douglas and Territory of Nebraska, the following-described real estate, to wit, described as follows: Beginning at the northwest corner of the northwest quarter of section twenty-eight (28), in township fifteen (15) north, of range thirteen (13) east, and running thence south 8.05 chains, thence south 85 east 20.10 chains, thence north 9.70 chains, thence west 20 chains to the place of beginning, containing 17.75 acres of land, more or less, and we do hereby covenant with the said Allen Root, his heirs and assigns, that we are lawfully seized of said premises; that they are free from incumbrances, and that we do hereby covenant to warrant and defend the said premises against the lawful claims of all persons whomsoever.

Witness our hands this tenth day of December, A. D. 1864.

HEMAN GLASS.
LUCY G. GLASS.

In presence of—
J. H. KELLOM.

(Int., 50c.)

TERRITORY OF NEBRASKA, } ss:
Douglas County, }

On this thirteenth day of December, A. D. 1864, before me, J. H. Kellom, clerk of the district court in and for said county, appeared

the above-named Heman Glass and Lucy G. Glass, personally known to me to be the identical persons whose names are affixed to the above instrument as grantors, and acknowledged the same to be their voluntary act and deed.

J. H. KELLOM, *Clerk.*

182 Recorded July 2, 1866, at 4 o'clock p. m.

STATE OF NEBRASKA, } ss:
Douglas County, }

I, T. A. Megeath, register of deeds in and for said county, in the State aforesaid, do hereby certify that I have compared the above and foregoing instrument as it appears of record in the office of said register of deeds, in Book T of Deeds, on page 239, and that the same is a full and correct copy thereof.

In testimony whereof I have hereunto set my hand and affixed my seal of office this 23rd day of April, A. D. 1889.

[SEAL.] T. A. MEGEATH,
Register of Deeds.

EXHIBIT "B."

Hileman, sh'ff, to Glass.

Know all men by these presents that whereas Heman Glass, at the June term of the district court of the Territory of Nebraska, within and for the county of Douglas, A. D. 1860, recorded a judgment in said court against Roswell G. Pierce for the sum of seven hundred and forty-two dollars and ninety-one cents, debt, and sixteen dollars, costs of suit; and whereas the said Herman Glass afterwards, on the 30th day of July, A. D. 1861, issued out of the clerk's office of said county an execution on said judgment of that date, directed to the sheriff of said county of Douglas, commanding him to make the amount of said judgment and costs less the sum of $553.14 heretofore paid on said judgment out of the lands and tenements of the said Roswell G. Pierce, which execution duly came to the hands of John C. Hileman, sheriff of said county of Douglas, to be executed, and such proceedings were legally had on said execution that afterwards, on the sixth day of September, A. D. 1861, the said John C. Hileman, as such sheriff, & by virtue of said execution, duly offered at public auction the lands and tenements hereinafter described levied upon as the property of the
183 said Roswell G. Pierce having first given notice of the time and place of said sale by advertisement published more than thirty days prior thereto in the Nebraska Republican, a newspaper printed in said county of Douglas, and then sold the same to the said Heman Glass for the sum of one hundred & ninety-eight dollars and twenty cents, the same being the highest and best price bid therefor: Now, I, John C. Hileman, sheriff of said county of Douglas, in consideration of the premises and by virtue of the powers in me vested by law, do hereby give, grant, and convey unto the

said Herman Glass, his heirs and assigns, the lands and tenements so sold as aforesaid and bounded and described as follows: The equal undivided one-fourth of the following-described piece of land: Beginning at the southeast corner of the northeast quarter of section twenty, in township fifteen (15) north, of range thirteen east, thence west 31.66 chains to a ditch fence, thence north 10 10′ east 3.11 chains, thence east 24.31 chains, thence north 1.75 chains, thence north 72 east 7.18 chains to the east line of said section, thence south 7.56 chains to the place of beginning, containing 12.67 acres; also the ewal undivided one-fourth of the following-described piece of land: Commencing on the south line of Dr. E. Lowe's land 11.43 chains south of corner to section- 17, 18, 19, & 20, in township 15 north, of range thirteen east, and running thence south 24.17 chains, thence east 40.60 chains, thence north 24.17 chains, thence west along said Lowe's south line 40.08 chains to the place of beginning, containing 96.78 acres; and also the whole of a tract described as follows: Beginning at the northwest corner of the northwest quarter of section 28, in township 15 north, of range 13 east, and running thence south 8.05 chains, thence south 85 east 20.10 chains, thence north 9.70 chains, thence west 20 chains to the place of begin-
184 ning, containing 17.75 acres; all of said lands being situated in the said county of Douglas and Territory of Nebraska; to have and to hold the said premises, with the appurtenances and hereditaments, to him, the said Heman Glass, and to his heirs and assigns forever.

In testimony whereof I, John C. Hileman, sheriff as aforesaid, have hereunto set my hand the seventh day of September, A. D. 1861.

JOHN C. HILEMAN,
Sh'ff Douglas County.

In presence of—
GEO. ARMSTRONG.

TERRITORY OF NEBRASKA, } ss:
County of Douglas, }

On this 7th day of September, A. D. 1861, before me, a probate judge in and for said county, personally came John C. Hileman, sheriff of said county of Douglas, known to me to be such sheriff and the identical person described in and who executed the foregoing conveyance, and acknowledged the same to be his voluntary act and deed.

GEORGE ARMSTRONG,
[SEAL.] *Probate Judge.*

Rec'd for record Sep. 10th, 1861, at 2½ p. m.

STATE OF NEBRASKA, } ss:
Douglas County, }

I, T. A. Megeath, register of deeds in and for said county, in the State aforesaid, do hereby certify that I have compared the above and foregoing instrument as it appears of record in the office of said register of deeds, in Book N of Deeds, on page 531, and that the same is a full and correct copy thereof.

In testimony whereof I have hereunto set my hand and affixed my seal of office, at Omaha, in said county, this 18th day of April, A. D. 1889.

[SEAL.] T. A. MEGEATH,
Register of Deeds.

185 EXHIBIT "B" "B."

Be it remembered that the following entries are found on Appearance Docket "C," in case No. 43, entitled Heman Glass *vs.* Roswell G. Pierce, in the district court of Douglas county, Territory of Nebraska:

Appearance Docket, February Term, 1860.

No. attornies: Plaintiff in person.
Parties: Heman Glass *vs.* Roswell G. Pierce.
Title of cause: Attachment.

Date of filing.	Proceedings.		
1860.			
Jan. 18.	Petition and affidavit filed.		
	Summons issued.		
	Order of attachment issued; paid $485.		
21.	Sum's ret'd, not found, 30.		
	Order of attachment ret'd.		
	Served on the 19th day of June, 1860.		
	By attaching the property of def't, 2.30.		
Apr. 4.	Aff. of pub. filed.		
	Or. of default filed.		
June 5.	Motion to dismiss filed, .05.		
6.	Journal entry filed.		
6.	Trial to court & judgment *vs.* def't for $742.91, damages and costs taxed at	$16 00	
July 21.	Writ of sale issued	1 00	
	Rec'd clerk's costs. E. B. Chandler, clerk		
	Order of sale returned sheriff, paid out of proceeds of first sale	25 78	
	Ent. & filing order	75	
Nov. 2.	Sale confirmed	25	
1861.			
July 30.	Execution issued	65	
Aug. 1.	Appraisement filed	5	
1861.			
Sept. 14.	Execution returned		
1862.			
May 9.	Order of confirmation filed	5	
	Make complete entry	1 20	
			2 95
1865.			
	Rec'd clerk's costs.		
Oct. 17.	Motion to vacate; judg't filed.		

JNO. H. KELLOM.

186 THE STATE OF NEBRASKA, } ss:
Douglas County, }

I, Frank E. Moores, clerk of the district court, third judicial district of the State of Nebraska in and for Douglas county, do hereby certify that the foregoing is a full and true copy of the App. Docket "C," page 43, in the case of Heman Glass *vs.* Roswell G. Pierce, as appears from the original thereof now on file in the office of the clerk of said court.

Witness my signature and official seal this 9th day of May, 1889.

[SEAL.] FRANK E. MOORES, *Clerk.*

Be it remembered that on the eighteenth day of January, A. D. 1860, Heman Glass, by his attorney, came into the district court of the first judicial district within and for Douglas county and Territory of Nebraska, and impleaded Roswell G. Pierce in an action of attachment; in which said action he filed his petition, the same being in words and figures following, to wit:

In the District Court, Douglas County, February Term, 1860.

HEMAN GLASS }
vs.
ROSWELL G. PIERCE. }

Petition.

Heman Glass, the plaintiff, complains of Roswell G. Pierce, defendant, and for cause of action says that on the 16th day of July, A. D. 1859, the said defendant made his certain promissory note in writing, dated at Omaha, Nebraska, on that day, whereby for value received he promised to pay, one day after date, to the plaintiff or his order the sum of six hundred and eighty-two dollars and thirteen cents, with interest, and then and there delivered the same to the plaintiff, who thereupon became and ever since has been and still is the true and lawful owner and holder thereof. The said note is in the words and figured following, to wit:

"$682.13. OMAHA, *July 16th*, 1859.

187 "One day after date, for value received, I promise to pay to Heman Glass or order the sum of six hundred and eighty-two dollars and thirteen cents, with interest.

"R. G. PIERCE."

That the said note or any part thereof has never been paid, but there is justly due to the plaintiff from the defendant thereon the said sum of $682.13, with interest, at the rate of ten per cent. per annum, from the 16th day of July, 1859.

And for a second cause of action the said plaintiff further says that the defendant on the first day of April, A. D. 1858, contracted with the plaintiff to pay to him a salary of seventy-five dollars per month as the general agent and attorney of the defendant in the Territory of Nebraska, payment to be made quarterly-yearly; that

the plaintiff, in pursuance of said contract, did on said day enter into the service of the defendant as such agent and attorney and has continued therein from thence until the present time; that on the 16th day of July, A. D. 1859, the said contract existing between the said defendant and the plaintiff *were* put into writing and signed by the plaintiff and defendant, and that on the same day the said defendant settled with the plaintiff on said contract in full up to the first day of July, A. D. 1859, by giving to him, the plaintiff, the note above mentioned and described.

That the said defendant has not paid the plaintiff for his service or any part thereof as such agent and attorney from and after the first day of July, A. D. 1859, aforesaid, except the sum of $65.00, paid on or about the first day of October, 1859, and that there was due and owing on said contract from the said defendant to the plaintiff on the first day of January, A. D. 1860, the sum of $385.00, which sum still remains due and unpaid.

Wherefore the plaintiff demands judgment against the said defendant for the sum of ($1,067.13) one thousand and sixty-seven $\frac{13}{100}$ dollars, together with interest thereon at the rate of ten
188 per cent. per annum, as follows: On the sum of $682.13 from the 16th day of July, A. D. 1859; on the sum of $160.00 from the first day of October, A. D. 1859, and on the sum of $225.00 from the 1st day of January, A. D. 1860, besides the costs of this action.

HEMAN GLASS, *Plaintiff.*

TERRITORY OF NEBRASKA, } ss:
Douglas County, }

Heman Glass, the plaintiff, being duly sworn, says he is the plaintiff in the foregoing petition; that he has read the same and knows the contents thereof, and the same is true of his own knowledge; and further says that servoce of summons cannot be made within this Territory on the defendant, and that the defendant is a non-resident of this Territory.

HEMAN GLASS.

Subscribed in my presence and sworn to before me this 18th day of January, 1860.

E. B. CHANDLER, *Clerk.*

District Court.

HEMAN GLASS
vs.
ROSWELL G. PIERCE.

The clerk of said court will please issue summons in this case for the defendant, Roswell G. Pierce. Plaintiff claims $1,067.13 and interest as stated in his petition.

Yours, &c., HEMAN GLASS.

DISTRICT COURT, *Douglas County,* } ss:

HEMAN GLASS
vs.
ROSWELL G. PIERCE.

Heman Glass, plaintiff, being duly sworn, says that the said Heman Glass has commenced an action in said court against the said Roswell G. Pierce, defendant, to recover the sum of $1,067.13
189 and interest now due and payable to the said plaintiff from the said defendant in the following manner—that is to say, the sum of $682.13 and interest thereon from the 16th day of July, A. D. 1859, on a promissory note given by sa-d defendant to the said plaintiff, and dated the 16th day of July, 1859, whereby the said defendant promised, one day after date, for value received, to pay to the plaintiff or his order the sum of $682.13, with interest, and the sum of $385.00 on a contract for services performed by the plaintiff for the said defendant at his instance and request, and interest thereon; that the said claims are just, and that the plaintiff ought to recover of the defendant thereon the sum of $1,067.13 and interest from the day the said sums were due and payable; and this affiant further says that the said Roswell G. Pierce is a non-resident of the Territory of Nebraska and a resident of the State of New York.

HEMAN GLASS.

Subscribed in my presence and sworn to before me this 18th day of January, 1860.

E. B. CHANDLER, *Clerk.*

And thereupon, to wit, the day and year aforesaid, was sued out of the clerk's office of said court a writ of summons, and the same is in the words and figures following, to wit:

THE TERRITORY OF NEBRASKA, *Douglas County,* } ss:

To the sheriff of the county of Douglas:

You are commanded to notify the defendant, Roswell G. Pierce, that he has been sued by Heman Glass in the district court of Douglas county; that unless he answer by the 20th day of February, A. D. 1860, the petition of the said plaintiff against him filed in the office of the clerk of said court, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the second
190 Monday after the date hereof, the same being the 30th day of January, A. D. 1860.

Witness my hand and the seal of said court, at Omaha, this 18th day of January, A. D. 1860.

[L. S.] E. B. CHANDLER, *Clerk.*

And thereupon afterwards, to wit, on the 21st day of January, in the year aforesaid, the sheriff of said county returned said summons into said clerk's office, endorsed in words and figures following, to wit:

Rec'd this writ January 18th, 1860, at 5 o'clock p. m. The within-named Roswell G. Pierce is not found in my county.
Mileage, 30 cts.; sh'ff's fees, —.

JOHN C. HELMAN,
Sheriff of Douglas County.

And thereupon, to wit, the 18th day of January, in the year aforesaid, was sued out of said clerk's office an order of attachment; which said order is in words and figures following, to wit:

THE TERRITORY OF NEBRASKA, }
Douglas County, }

To the sheriff of said county, Greeting:

HEMAN GLASS, Plaintiff, }
vs.
ROSWELL G. PIERCE, Defendant. }

To the District Court, Douglas County.

You are commanded to attach and safely keep the lands and tenements, goods, chattels, stocks, or interest in stocks, rights, credits, moneys, and effects of the above-named defendant in your county and not exempt by law from being applied to the payment of the above-named plaintiff's claim, or so much thereof as will satisfy the said plaintiff's claims for ten hundred and sixty-seven and $\frac{13}{100}$ dollars and interest on $682.13 *dollars* from the 16th day of July, 1859, on $160 from the first day of October, 1859, and on $225.00 from the first day of January, 1860, and fifty dollars, the 191 probable cost of this action.

You will make due return of this order on the second Monday after the date hereof, the same being the 30th day of January, A. D. 1860.

Witness my signature and the seal of said court, at Omaha, this 18th day of January, A. D. 1860.

[L. S.] E. B. CHANDLER, *Clerk.*

And thereupon, afterwards, to wit, on the 21st day of January, in the year aforesaid, the sheriff of said county returned said order into said clark's office, endorsed in words and figures following, to wit:

We, John C. Helman, sheriff of the county of Douglas, and Alfred Sayre and George I. Gilbert, two residents of said county, the said Alfred Sayre and George I. Gilbert being first duly sworn to truly inventory and appraise the following property attached as the property of Roswell G. Pierce on an order of attachment issued in a suit of Heman Glass against the said Roswell G. Pierce, now

pending in the district court for said county of Douglas, to wit, the undivided ¾ of 62.44 acres of land in the south half and 34.34 acres in the north ½ of the N. W. quarter of section 20, in township No. 15 north, of range 13 east, value and appraise at $10 per acre, making the undivided ¾ amount to the sum of $725.85.

Also the undivided ¾ of 12.40 acres on the south side of the N. E. quarter of said section 20, value and appraise at $15.00 per acre undivided ¾ of ($139.50), and also a certain mortgage on 82.17 acres in said N. E. quarter of said section 20, dated Aug. 6th, 1857, and given by one S. S. Marston and wife to Geo. A. Peters and assigned by said Peters to the said defendant, appraised and valued at $1,232.55.

Given under our hands this 19th day of January, A. D. 1860.

GEO. I. GILBERT.
ALFRED SAYRE.

192 Rec'd this order of attachment on the 18th day of January, 1860, at 5 o'clock p. m., and, according to the command thereof, I did on the 19th day of January, 1860, attach in the presence of Alfred Sayre and Geo. I. Gilbert, two residents of said county, the following lands and tenements, rights and credits, a schedule of which will appear below, taken as the property of the within defendant, and in connection with the said Alfred Sayre and Geo. I. Gilbert made an inventory and valuation thereof in writing, which is herewith returned, and left in conspicuous place on said real estate, being unoccupied, a true copy of the within order, and the said mortgage I took into my possession and delivered a true copy of the order to the plaintiff, Heman Glass, with whom the said mortgage was found, and hold the same now subject to the order of the court.

January 19th, 1860.

JOHN C. HELMAN, *Sheriff.*

Service, $1.00; copies, 75 cts.; swearing appraisers, 25; mileage, 30; P. 2.30.

And thereupon, afterwards, to wit, on the 4th day of April, in the year aforesaid, said plaintiff filed in said clerk's office an order of default; which said order is in words and figures following, to wit:

District Court, Douglas County.

HEMAN GLASS
vs.
ROSWELL G. PIERCE.

To the clerk:

The time limited by law for the defendant to file his answer in this cause having expired, you will please enter his default herein as prescribed by the rules of this court.

Yours, &c., HEMAN GLASS.

193 And thereupon, afterwards, to wit, the day and year last above written, was filed in the office of said clerk a notice and affidavit of the publication of the pendency of said suit; which said notice and affidavit *is* in words and figures following, to wit:

District Court, Douglas County.

HEMAN GLASS
vs.
ROSWELL G. PIERCE, Defendant.

To Roswell G. Pierce, non-resident defendant:

You are hereby notified that Heman Glass has filed in the office of the clerk of the district court for Douglas county and Territory of Nebraska his petition against you, wherein he prays judgment against you on a certain promissory note made by you for the sum of six hundred and eighty-two dollars and thirteen cents, dated July 16th, A. D. 1859, and payable to the plaintiff at his order one day after date, with interest, and also for the sum of three hundred and eighty-five dollars on a contract for services rendered by this plaintiff for the said defendant, and that an order of attachment has been issued in this case, and are further notified to appear and answer the said petition on or before the second day of April, A. D. 1860, or judgment will be rendered against you in said action.

February 25th, 1860.

HEMAN GLASS.

TERRITORY OF NEBRASKA, } *ss:*
County of Douglas, }

I, Merrels H. Clark, being duly sworn, on my oath do say that the notice hereunto attached was published for four consecutive weeks next after the 25th day of February, 1860, in the Omaha Nebraskan, a newspaper published by Robertson and Clark and printed in said county of Douglas, and which was during that time in general circulation in said county.

M. H. CLARK.

Sworn to and subscribed before me this 2nd day of April, A. D. 1860.

JOSEPH H. MILLARD, [L. S.]
Notary Public.

Fees: Publication, $6.00.

194 And thereupon, afterwards, to wit, at the June term of the district court within and for Douglas county, in the year aforesaid—the Hon. Augustus Hall, the judge presiding—on the 5th day of June said plaintiff filed in said cause a motion to dismiss this suit as to the 2nd cause of action mentioned in said cause; which said motion is in words and figures following, to wit:

District Court, Douglas County.

HEMAN GLASS
vs.
ROSWELL G. PIERCE.

Now comes the plaintiff in this action and asks leave of the court to withdraw without prejudice the second cause of action mentioned in the plaintiff's petition, and also that the attachment may be dismissed as to the mortgage mentioned in the return of the sheriff.

HEMAN GLASS.

And thereupon, afterwards, to wit, at said term of said court and on the sixth day of June, in the year aforesaid, final judgment was rendered in said cause, which appears of record in words and figures following, to wit:

HEMAN GLASS, Plaintiff,
vs.
ROSWELL G. PIERCE, Def't. } Attachment.

This cause coming on this day to be heard on motion of Heman Glass, the plaintiff, in person, leave was granted by the court to withdraw without prejudice the second cause of action mentioned in the plaintiff's petition, and also to dismiss the attachment as to the mortgage mentioned in the sheriff's return; and proofs being made by the plaintiff that the defendant had been notified of the pendency of this action by publication, as provided by statute, and the said defendant having failed to appear and answer or demur to the plaintiff's petition, his default was entered.

195 It is considered and adjudged that the plaintiff recover of the defendant the amount of the promissory note mentioned and described in the first cause of action in the plaintiff's petition, to wit, the sum of six hundred and eighty-two dollars, and thirteen cents interest thereon, and that the plaintiff have judgment against the said defendant for the sum of seven hundred and forty-two dollars and ninety-one cents, and also for the sum of sixteen dollars for his costs in this suit in his behalf expended; and it is further ordered and adjudged that the sheriff proceed as upon execution to advertise and sell so much of the real property heretofore attached in this action and now in his hands remaining as will satisfy the said plaintiff his aforesaid judgment and costs, and out of the proceeds of said sale pay to the said plaintiff the amount of his said judgment and interest thereon at the rate of ten per cent. per annum and the costs of this suit and hold the balance, if any, subject to the order of the defendant.

Execution. Filed Sept. 14, 1861.

THE TERRITORY OF NEBRASKA, } ss:
Douglas County, }

HEMAN GLASS
vs.
ROSWELL G. PIERCE.

To the sheriff of Douglas county, Greeting:

Whereas at the June term, A. D. 1860, of the district court in and for said county of Douglas Heman Glass obtained a judgment against Roswell G. Pierce for $742.91, damages, and sixteen dollars, the cost of suit, on which judgment has been received $553.14, as appears by an order of sale issued and returned in this cause on September 5th, 1860, as appear- by the records of said court:

Therefore, in the name and by the authority of said Territory, we command you, John C. Hileman, sheriff of said Douglas
196 county, that of the goods and chattels, and for want thereof of the lands and tenements, of the said Roswell G. Pierce found in your county you cause to be made the amount of said judgment and costs, less the amount paid as above, with interest thereon from the sixth day of June, A. D. 1860, until paid, together with accruing costs, by virtue of this writ, as also writs and orders issued in said cause, and have the said several sums of money, with the accruing costs and this writ, before the clerk of the district court, at Omaha, within sixty days, then and there to render unto the respective persons entitled thereto.

Witness my signature and the seal of our said district court, at Omaha, this 30th day of July, A. D. 1861.

[SEAL.] E. B. CHANDLER, *Clerk,*
By JOHN H. KELLOM, *Deputy.*

Indorsement: To June term, 1860. Damages, 742.91; costs, 16.00 int. from 6th June, 1860; increase costs, 2.80. App. Dock. C, page 43; Exec. Doc. —, page —. Returned and filed Sept. 14, 1861 Jno. H. Kellom, clerk.

Sheriff's Sale.

TERRITORY OF NEBRASKA, } ss:
Douglas County, }

By virtue of an execution issued out of the district court for the 1st judicial district of the Territory of Nebraska in and for the county of Douglas and under the seal of said court, and to me directed, in a certain cause wherein Heman Glass is plaintiff and Roswell G. Pierce defendant, and under and by virtue of said writ I have levied upon the following-described real estate, to wit: The undivided ¼ of the following-described piece of land, viz: Beginning at the southeast corner of the northeast quarter of sec. 20, T.

15 N., R. 13 E., thence west 31.66 chains to a ditch fence, thence north 1.75 chains, thence north 72 deg. east 7.18 chains to
197 the east line of said section, thence south 7.56 chains to the place of beginning, being the undivided ¼ — 12.67 acres; also the undivided ¼ of the following-described piece of land commencing on the south line of Dr. E. Lowe's land, 11.43 chains south of corner to sections 17, 18, 19, 20, in township 15 north, of range 13 east, and running thence south 24.17 chains, thence east 40.60 chains, thence north 24.17 chains, thence west along said Lowe's south line 40.08 chains to the place of beginning; and also a tract situated in the N. W. ¼ of N. W. ¼ of section 28, T. 15 N., R. 13 east, and bounded as follows: Beginning at the N. W. cor. of said section, thence south 8.05 chains, thence south 85 deg's east 20.10 chains to place of beginning, containing 17.75 acres, more or less, taken as the property of said defendant—

I will, on the 6th day of September, A. D. 1861, expose for sale and sell at public auction or vendue to the highest bidder, between the hours of 9 a. m. and 4 p. m. of that day, the said real estate; said sale to take place before the Pioneer block, in Omaha city, Douglas county, Nebraska Territory.

Sheriff's office, August 1st, A. D. 1861.

JOHN C. HILEMAN, *Sheriff.*

Affidavit of Publication.

Isaac T. Webster, being duly sworn, deposes and says that he is a printer in the office of the Nebraska Republican, a newspaper printed at Omaha, in the said county of Douglas; that the printed notice hereto attached was published in the said newspaper for more than thirty days next before the 6th day of September, 1861; that said newspaper was during that time in general circulation in the county of Douglas.

ISAAC T. WEBSTER.

Sworn to and subscribed before me this seventh day of September, 1861.

[SEAL.] GEORGE ARMSTRONG,
Probate Judge.

198 *Sheriff's Return.*

Received the execution hereto annexed July 31st, 1861, at 10 o'clock a. m. of said day, and, according to the command thereof, I did, on the 1st day of August, 1861, levy the same on the following real estate as the property of the said Roswell G. Pierce, to wit: The undivided ¼ of the following-described piece of land, viz: Beginning at the southeast corner of the northeast quarter of sec. 20, T. 15 N., R. 13 E., thence west 31.66 chains to a ditch fence, thence north 10 deg. 10 min. east 3.11 chains, thence — 24.31 chains, thence north 1.75 chains, thence north 72 deg. east 7.18 chains to the east line of said section, thence south 7.56 chains to the place of beginning, being the undivided ¼ of 12.67 acres, which is hereby desig-

nated lot No. 1; also the undivided ¼ of the following-described piece of land: Commencing on the south line of Dr. E. Lowe's land, 11.43 chains south of corner to sections 17, 18, 19, 20, in township 15 north, of range 13 east, and running thence south 24.17 chains, thence east 40.60 —, thence north 24.17 chains, thence along Lowe's south line 40.08 chains to the place of beginning, containing 96.78 acres, which is hereby designated as lot No. 2; also a tract of land situated in the N. W. ¼ of the N. W. ¼ of sec. 28, town. 15 N., R. 13 east, and bounded as follows: Beginning at the N. W. corner of said section, thence south 8.05 chains, thence south 85 degrees east 20.10 chains, thence north 9.70 chains, thence 20 chains west to the place of beginning, containing 17.75 acres, more or less, which is hereby designated as lot No. 3, all of said land being situated in said county of Douglas and Territory of Nebraska.

Thereupon at the making of said levy I summoned E. B. Chandler and John I. Redick, two disinterested freeholders of said county, and administered to them an oath impartially to appraise said lands so levied upon; and afterwards, on the 1st day of
199 August, 1861, the said appraisers returned to me in writing their valuation of said lands, a copy of which I forthwith deposited with the clerk of said district court, and thereupon, on the 1st day of August, 1861, I caused a notice to be published in the Nebraska Republican, a newspaper published in said county of Douglas and of general circulation therein, that I would offer said lands for sale in front of the Pioneer block, in which said district — was last had, in Omaha city, in said county of Douglas, on the 6th day of September, 1861, between the hours of 9 a. m. and 4 p. m. of said day; and at the time and place stated in said notice I offered said premises for sale at public auction and sold the same to Heman Glass as follows: For lot designated No. 1, containing 12.67 acres, $1.00 per acre for ¼ interest; for lot designated No. 2, containing 96.78 acres, $1.00 per acre for ¼ interest, and for lot designated No. 3, containing 17.75 acres, $5.00 per acre for whole; whole amount from said sale by me was $198.20.

JOHN C. HILEMAN,
She'ff Douglas County.

$6 00 shff's fees.
8 00 printer's fees.

$14 00 paid by plaintiff.

Confirmation of Sale.

District Court, Douglas County.

HEMAN GLASS
vs.
ROSWELL G. PIERCE. } Order.

On motion of the said Heman Glass, plaintiff, and on producing the return of the sheriff of this county of a sale of real estate made by him on the 6th day of September, A. D. 1961, to the said Heman

Glass on an alias execution issued in this case and dated the 30th day of July, A. D. 1861, and the court, on examination of said proceedings, being satisfied that said sale has been made in all respects in conformity to law, it is ordered that the said sale and pro-
200 ceedings be, and the same *is* hereby, confirmed, and the said sheriff is ordered to make to the purchaser a deed for the lands and tenements so sold.

HEMAN GLASS
vs.
ROSWELL G. PIERCE.

THE TERRITORY OF NEBRASKA, *Douglas County.* } *ss*:

To the sheriff of said county, Greeting:

Whereas, heretofore, to wit, on the 18th day of January, A. D. 1860, we issued our order of attachment in a suit pending in the district court in and for said county wherein Heman Glass was plaintiff and Roswell G. Pierce was defendant, to you directed, in which order under the seal of our court we commanded you to attach and safely keep the lands, tenements, goods, chattels, stocks or interests in stocks, rights, credits, moneys, and effects of the said defendant, Roswell G. Pierce, in your county, not exempt by law from being applied to the payment of the said plaintiff's claim or so much thereof as would satisfy the said plaintiff's claim for ten hundred and sixty-seven dollars and thirteen cents and interest thereon, and fifty dollars, the probable costs of the said suit; and you, on the 21st day of January, A. D. 1860, made your return to said order that you had attached the lands, tenements, rights, and credits of the said defendant, Roswell G. Pierce, to the value of two thousand and ninety dollars:

Now, therefore, in the name and by the authority of the said Territory, we command you that you sell or cause to be sold the lands and tenements by you taken as aforesaid and now in your hand remaining and every part thereof for the best price
201 that can be obtained for the same or so much thereof as may be sufficient to satisfy the judgment for seven hundred and forty-two dollars and ninety-one cents, obtained in the aforesaid action by the said plaintiff against the said defendant, and interest thereon from the sixth day of June, A. D. 1860, until paid, and sixteen dollars costs, together with all accruing costs, and make your return of your proceedings herein within sixty days after the date hereof.

Witness my signature and the seal of our district court, at Omaha, this 21st day of July, 1860.

[SEAL.] E. B. CHANDLER, *Clerk.*

And thereupon the affidavit of publication, with printed notice attached, appears in words and figures following, to wit:

TERRITORY OF NEBRASKA, } ss:
Douglas County, }

Chas. M. Aumock, being duly sworn, deposes and says that in the month of August, A. D. 1860, he was the foreman in the office of the Nebraska Republican, a newspaper printed at Omaha, in the said county of Douglas; that the printed notice hereto attached was published in the said newspaper more than 30 days next before the 25th day of August, A. D. 1860; that said newspaper was, during that time, in general circulation in the county of Douglas aforesaid; also further says that he has examined the files of the said Nebraska Republican for the year 1860, and finds that the printed notice hereto attached was published in the said Nebraska Republican for five consecutive weeks next before the said 25th day of August, A. D. 1860.

CHAS. M. AUMOCK.

Sworn to and subscribed before me this seventh day of June, 1864.

BYRON REED,
County Clerk.

B. R.
June 7, 1864.

202 *Sheriff's Sale.*

By virtue of an order of sale issued out of the district court for the first judicial district of the Territory of Nebraska, in and for the county of Douglas, and under the seal of said court, and to me directed, in a certain cause wherein Heman Class is plaintiff and Roswell G. Pierce is defendant, I will, on the 25th day of August, A. D. 1860, expose for sale and sell at public auction or vendue, to the highest bidder, between the hours of 9 a. m. and 4 p. m. of that day, all the right, title, and interest of the said defendant in and to the following-described premises situate in said county of Douglas and heretofore attached by me in the above action as follows, to wit, the undivided $\frac{3}{4}$ of 62.44 acres on the north side of the south $\frac{1}{2}$ and of 34.34 acres on the south side of the north $\frac{1}{2}$ of the northwest quarter of section twenty, in township fifteen north, of range thirteen east, of the sixth principal —, and also the undivided $\frac{3}{4}$ of 12.67 acres on the south side of the northeast quarter of said section twenty, being the three several pieces of land deeded to the said Roswell G. Pierce by George A. Peters and wife by three several deeds, dated, respectively, as follows: the 26.44 acres by deed dated April 8th, 1858; the 34.34 acres by deed dated June 23rd, 1859, and 12.67 acres by deed dated November 19th, 1857, reference to which deeds, as recorded, is made for a more particular description; said sale to take place before the Pioneer block, in Omaha city, Douglas county, Nebraska Territory.

JOHN C. HILEMAN, *Sheriff.*

Sheriff's office, July 25th, 1860.

And thereupon the sheriff's return appears in words and figures following, to wit:

District Court, Douglas County, Territory of Nebraska.

HEMAN GLASS
vs.
ROSWELL G. PIERCE.

203 I certify and return that according to the command of the order of sale hereto attached on the 25th day of July, 1860, I proceeded to advertise the following-described lands of the defendant for sale at public auction or vendue by causing public notice of the time and place of the sale thereof to be given for thirty days next after before the day of said sale in the Nebraska Republican, a newspaper published weekly at Omaha city, in said county of Douglas, and of general circulation, all the right, title, and interest of the said defendant in and to three several parcel- of land situate in said county of Douglas and heretofore attached by me in the above-entitled cause, and which three several parcels are bounded and described as follows, to wit: The undivided ⅔ of 62.44 acres on the north side of the south half and of 34.34 acres on the south side of the north half of the northwest quarter of section twenty, in township fifteen north, of range thirteen east, of the — principal meridian, and also the undivided ⅔ of 12.76 acres on the south side of the northeast quarter of said section twenty, being the three several pieces of land deeded to the said Roswell G. Pierce by George A. Peters and wife by three several deeds dated, respectively, as follows: The 62.44 acres by deed dated April 8th, 1853; the 34.34 acres by deed dated June 23rd, 1859, and 12.67 acres by deed dated November 19th, 1857, reference to which deeds as recorded is made for more particular description.

I further certify and return that on the day, to wit, the 25th of August, 1860, and at the time and place named in the notice of sale aforesaid, I duly offered the said lands for sale to the highest bidder, and then and there came Heman Glass, who bid for said lands as follows, to wit: For the undivided ⅔ of 62.44 acres, $5.00 per acre; for the undivided ⅔ of 34.34 acres, $5.00 per acre; for the undivided ⅔ of 12.67 acres, $7.50 per acre, all of which land so sold is
204 described as aforesaid, and the sums respectively bid per acre as aforesaid being two-thirds of the appraised value of said lands per acre, and the said Heman Glass being the highest and best bidder therefor, I struck off and sold the said lands to him for said sums so as aforesaid bid by him. Whole amount made from said sale by me was $578.92.

JOHN C. HILEMAN,
Sh'ff Douglas County.

$2.00 advertising & making return,
1.00 attending sale,
12.78 percentage on $578.92,
10.00 printer's fees,
15.78 sh'ff's fees,

Made the sum of	$578 92
Deduct my commission	25 78
Balance to credit of this order of sale	$553 14

Rec'd the above amount, $553.1–, of John C. Hileman, sh'ff of Douglas county.
Omaha, Sept. 5th, 1860.

HEMAN GLASS.

And thereupon, at the November term, 1860, of said district court, and on the 3rd day thereof—Hon. A. Hall, judge presiding—the following proceedings were had, to wit:

HEMAN GLASS
vs.
ROSWELL G. PIERCE.

On motion of the said plaintiff in person, and on producing the return of the sheriff on the 25th day of August, A. D. 1860, to the said Heman Glass on an order of sale issued in this case and dated the 21st day of July, A. D. 1860, and the court, on examination of said proceedings, being satisfied that said sale has been made in all respects in conformity to law, it is ordered that the said sale and proceedings be, and the same *is* hereby, confirmed, and the said sheriff is ordered to make to the purchaser a deed for the lands and tenements so sold.

A. HALL, *Judge.*

205 *Certificate.*

THE STATE OF NEBRASKA, } *ss:*
Douglas County, }

I, Frank E. Moores, clerk of the district court, third judicial district of the State of Nebraska in and for Douglas county, do hereby certify that the foregoing is a full and true copy of the complete record in the case of Heman Glass *vs.* Roswell G. Price, as appears from the original thereof now on file in the office of the clerk of said court.

Witness my signature and official seal this 6th day of June, 1888.

[SEAL.] FRANK E. MOORES, *Clerk.*

EXHIBIT "B" "B" "B."

Morton to Morton.

This indenture witnesseth: That Oliver P. Morton and his wife, Lucinda M. Morton, of Marion county, in the State of Indiana, release and quitclaim to William S. T. Morton, of Wayne county, in the State of Indiana, for the sum of one thousand dollars, the following real estate in Douglas county, in the State of Nebraska, to wit: All that piece or parcel of land beginning at the northwest corner of section twenty-eight (28), running thence south eight (8) chains and five links, thence south eighty-five (85) degrees twenty (20) chains and ten (10) links, thence north nine (9) chains and seventy (70) links, thence west twenty (20) chains to the place of beginning, all in township fifteen (15) —, of range thirteen (13) east, of the 6th principal meridian line.

In witness whereof the said Oliver P. Morton and his wife, Lucinda Morton, have hereunto set their hands and seals this 19th day of August, A. D. 1869.

[Int. rev., 50c.]

O. P. MORTON. [SEAL.]
206 L. M. MORTON. [SEAL.]

STATE OF INDIANA, } ss:
Wayne County, }

Before me, Wm. A. Perllo, a notary public in and for said county, this 19th day of August, A. D. 1869, — Oliver P. Morton & his wife, Lucinda M. Morton, known to me to be the parties who executed the foregoing deed, & separately and apart from each other acknowledged the execution of the annexed deed.

Witness my hand and notarial seal.

[L. S.] WM. A. PERLLO,
Notary Public.

Recorded Sept. 15th, A. D. 1869, at 3 o'clock p. m.

STATE OF NEBRASKA, } ss:
Douglas County, }

I, T. A. Megeath, register of deeds in and for said county, in the State aforesaid, do hereby certify that I have compared the above and foregoing instrument, as it appears of record in the office of said register of deeds, in Book 7 of Deeds, on page 154, and that the same is a full and correct copy thereof.

In testimony whereof I have hereunto set my hand and affixed my seal of office, at Omaha, in said county, this 18th day of April, A. D. 1889.

[SEAL.] T. A. MEGEATH,
Register of Deeds.

EXHIBITS "B" "B" "B" "B."

Be it remembered that on the 11th day of November, 1872, there were filed in the office of the clerk of the circuit court of the United States, district of Nebraska, depositions taken before W. O. Bartholomew, master in chancery of said court, to be used in evidence in said court in case No. 40, B, in which O. P. Morton was complainant and Allen Root was respondent, of which the following testimony of M. J. Ragan, O. B. Selden, & Nelson Hartgrove is a part:

207 And the defendant produced M. J. RAGAN, who, being first duly sworn, as hereinafter certified, deposed as follows:

State your name, age, place of residence.

Ans. M. J. Ragan; 21 years. I live in Selden & Isaac's addition to Omaha.

Look at next to last page of the bill and state whether you are acquainted with the parcel of land therein described.

Ans. I am.

State whether or not you have seen any improvements thereon within the last 2 years; and, if so, state of what they consisted.

Ans. Yes, sir; I saw last year, in May or June, about an acre and ½ or two acres planted with potatoes.

State who planted those potatoes.

Ans. John Cooper, who was working for Mr. Root. I was there also when he was grubbing it up.

State what, if anything, you saw done on this land in the year 1870.

Ans. I think I saw some grubbing done on it in the fall.

M. J. RAGAN.

O. B. Selden.

Also O. B. SELDEN, who, being first duly sworn, as hereinafter certified, deposed as follows:

State your name, occupation, & place of residence.

Ans. O. B. Selden; farmer; reside in West Omaha.

State whether or not you are acquainted with the northwest quarter of the northwest quarter of sec. 28, twp. 15 N., range 13 east, of the 6th P. M.; and, if so, how long you have known that piece of land?

Ans. I am acquainted with it, and have been since 1854.

State whether or not you now live on the land adjoining the tract just now described on the north, and how long you have lived there.

Ans. I lived in the section of land joining that on the north, and have for the last 6 years.

208 What improvements, if any, or acts of occupancy upon the tract of land first referred to have been made in the last 3 or 4 years?

Ans. A small piece of the land has been grubbed out and pota-

toes raised on it last year—1871. The grubbing was done the year before.

How frequently have you seen the piece of land that was improved during the last 3 years?

Ans. Not frequently; perhaps a dozen times a year.

O. B. SELDEN.

Also NELSON HARTGROVE, who, being first duly sworn, as hereinafter certified, deposed as follows:

Q. State your name, age, and place of residence.

Ans. Nelson Hartgrove; aged 52 years. I live in Douglas precinct, Douglas Co., State of Nebraska.

Q. State whether or not you are acquainted with the northeast quarter of the northeast quarter of section 28 and being a part of the premises in controversy in this action.

Ans. I know where the property is and have been on it.

Q. What improvements, of any, has there been upon said premises? When did you first see such improvemts?

Ans. There is about 1½ or 1¼ acres grubbed clear and smooth. I first saw that improvement about the 1st of March one year ago, and then I saw it afterwards when it was planted in potatoes, probably about 2 months after that. The improvements was made near the north line. It was about ⅓ of the distance from the northwest corner to the northeast corner of the 40-acres tract.

State how you know the premises.

Ans. About 2 years ago I proposed buying 1 acre of ground of Mr. Root on the east side of his land, and we still kept bantering on the price until March a year ago, when we met and he showed me the premises.

NELSON HARTGROVE.

UNITED STATES OF AMERICA, } *ss*:
District of Nebraska, }

209 I, Elmer D. Frank, clerk of the circuit court of the United States for the district of Nebraska, certify that I have compared the annexed copy of deposition in case of Morton *vs.* Root with the original on file in this office, and that the same is a correct transcript thereof and of the whole of said original.

In testimony whereof I have caused the seal of said court to be hereunto affixed, at the city of Omaha, in said district, this 1st day of May, 1889.

[SEAL.] ELMER D. FRANK, *Clerk.*

EXHIBIT "C."

WILLIAM WADE
vs.
JANE A. NORTH & HORACE GREEN.

Upon filing due proof of the publication of notice to the defendant Green of the pendency of this suit, and said defendant having

failed to plead, answer, or demur to the bill of complaint, and the time for that purpose —, on motion of James M. Woolworth, solicitor for complainant, it is ordered that the said bill be, and is hereby, taken as confessed against him; and the demurrer of the defendant North, having come on to be heard, was argued by counsel; and the court, being fully advised in the premises, finds the same not well taken and orders the same to be, and it is hereby, overruled; and thereupon this cause came on to be heard, and it is by this court declared that the mortgage mentioned by the complainant in his said bill be, and it is, fraudulent and void, and Daniel Gantt, one of the master's of this court, is directed to enter in the margin of the record of said mortgage, in the register's office, the following:

"This mortgage is declared fraudulent and void by the dis-
210 trict court, in chancery, in a suit determined therein at its October term, 1861, wherein William Wade is complainant and Horace Green and Jane A. North are defendants.—Daniel Gantt, master in chancery." And it is ordered and decreed that said defendant, Green, deliver said mortgage up to said master to be cancelled.

And it is ordered, adjudged, and decreed that said Jane A. North make, execute, and deliver to the said complainant a deed in fee simple, absolutely, and in such form as said master shall approve, conveying the premises mentioned in said bill to him. The premises to be affected by this decree are known and described as follows: "The west half of the northwest quarter of section number twenty-eight (28), in township number fifteen (15) north, of range number thirteen (13) east, of the sixth principal meridian."

And it is ordered that the complainant recover of the said defendants —, to be taxed; and thereupon the said defendant, Jane A. North, prays an appeal to the supreme court.

By the court:

WM. F. LOCKWOOD, *Judge.*

THE STATE OF NEBRASKA, } ss:
Douglas County, }

I, Frank E. Moores, clerk of the district court, third judicial district of the State of Nebraska in and for Douglas county, do hereby certify that the foregoing is a full and true copy of the decree entered on the 27th day of Nov., 1861, in the case of William Wade *vs.* Jane A. North *et al.*, as appears from the original thereof now on file in the office of the clerk of said court.

Witness my signature and official seal this 26th day of April, 1889.

[SEAL.] FRANK E. MOORES, *Clerk.*

EXHIBIT "D."

211 UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

I, Chas. A. Potter, examiner in chancery, duly appointed by the circuit court of the United States for the district of Nebraska, in the

eighth circuit, do hereby certify that — the several days named in the depositions hereto annexed I was attended at my office, named in this annexed notice, in the city of Omaha, by the counsel and witnesses aforesaid; that the said witnesses were duly sworn and examined, and the depositions were reduced to writing and read to the witnesses and by them subscribed in my presence, except such as the signatures were waived by the counsel for the respective parties.

I further certify that Exhibits A, B, "B B," "B B B," "B B B B," "B B B B B," C & D (true, exact, and perfect copies of which are hereto attached, marked Exhibits A, —, "B B," "B B B," "B B B B," "B B B B B," C & D) were introduced in evidence in said cause during the taking of said deposition.

Dated Nov. 9th, 1889.

C. A. POTTER,
Examiner in Chancery.

Fees.

Depositions, 424 folios, 20 cents per folio	$84 80	
Swearing 13 witnesses, 10 cents	1 30	
8 exhibits, 10 cents each	80	
Plaintiff: 424 folios, at 10c. each	42 40	$84 80
Defendant: 424 folios, at 10c. each	42 40	
	$171 70	

To copy furnished for—

To be paid by defendant	$129 30
To be paid by plaintiff	84 80

Upon the back of said depositions appear endorsements in words and figures following, to wit: No. 212, docket "M." Rec'd Nov. 13, '89, and opened by order of court Nov. 14, '89. Elmer D. Frank, clerk.

212 In the Circuit Court of the United States, District of Nebraska.

JAMES M. WOOLWORTH, Complainant,
vs.
ALLEN ROOT, Respondent.
} In Equity. 212, M.

DEAR SIR: You will please take notice that the above-named respondent desires the evidence to be adduced in said case to be taken orally under the sixty-seventh rule in equity of the Supreme Court, as amended.

You will further t-ke notice that by an order made in said cause by Chas. A. Potter, examiner in chancery of said court, the examination of witnesses on the part of sa-d respondent will take place before said examiner, at his office, room 710, New York Life building, Omaha, Nebraska, on the 1st day of November, 1889, at 10

o'clock a. m., and proceed as the said examiner may direct, adjourning from day to day if necessary.

GEO. W. COVELL,
Solicitor for Respondent.

To James M. Woolworth, solicitor for complainant.

Ordered that the testimony of witnesses for respondent in foregoing cause mentioned may be taken before me, at the place therein stated, on the 1st day of November, 1889, at 10 o'clock a. m.

Such examination to proceed until completed, unless adjourned for cause.

It is further ordered that solicitors for complainant have three days' notice of examination.

C. A. POTTER,
Examiner in Chancery.

Endorsed: 212, M. James M. Woolworth *vs.* Allen Root. Notice of oral examination of witnesses and order on behalf of ——. I accept service of this notice this 28th day of October, 1889. J. M. Woolworth, sol. for complainant.

213 In the Circuit Court of the United States for the District of Nebraska.

JAMES M. WOOLWORTH, Complainant,
vs.
ALLEN ROOT, Defendant. } 212, M. In Chancery.

Testimony taken before Chas. A. Potter, examiner in chancery of said court, ——day, the — day of ——, A. D. 18—, pursuant to annexed notice and order.

Present: A. J. Poppleton, sol. for complainant; Geo. W. Covell, sol. for respondent.

RICHARD COLGEN, a witness on behalf of the respondent, being first duly cautioned and sworn, was examined in chief by Mr. COVELL, deposes and says as follows:

RICHARD COLGEN, sworn for the defendant, examined in chief by Mr. COVELL, testified as follows:

Q. In what city, county, and State do you live?

A. I believe I live in Douglas county, in the State of Nebraska.

Q. How long have you lived in Douglas county?

A. On and off, for 11 years; the 28th day of next June I will be here 12 years.

Q. Do you know the land on which Allen Root now lives; and, if so, how long have you known that land?

A. I have known that land ever since I have been here. I camped on the edge of the grove there when I first came to Nebraska.

Q. State if you ever knew a man by the name of Henry A. Akin.

A. Yes, sir.

Q. When did you first know him?

A. I believe it was in 1882 or 1883; I believe; I would not say for certain.

Q. You may state if you were at a meeting between Henry A. Akin and Gen. George M. O'Brien, Allen Root, and others, in which some arrangement was made with Mr. Akin to live upon the land now occupied by Mr. Root; and, if so, you may state when
214 that meeting took place and what occurred at that meeting, within your remembrance. First state *first* if you were present.

Objected to as immaterial, incompetent, and irrelevant; that the only design of the question can be to contradict Mr. Akin, and the time and place of the conversation sought to be contradicted was not fixed in Mr. Akin's testimony, and no foundation is therefore laid for such testimony.

A. I can tell a straight statement of it. Yes; I was present at the time—George M. and I and Mr. Akin and Mr. Root—and he found fault with Theodore Gallagher for not putting up a fence on the place. George M. O'Brien says to him, You put on that fence yourself, sir, and when you are going away either sell it or take it along. He says to him also, You be careful of that timber of Mr. Root's and let nobody cut it. So, then, the house was to be placed on Mr. Root's land; was, as near as I can find out at the present, where the fence is; it stood on his and on the middle, I suppose, as near as I can get after it—on the middle of Poppleton avenue—and his stable stood over across the street, on the other side.

Q. Which side of Poppleton avenue did Mr. Akin's stable stand?

A. On the north side.

Q. What did Mr. Root say to Mr. Akin at that time when you and O'Brien and Akin were there together?

Objected to as incompetent testimony, and the statements of Mr. Root, a party to this suit, not being admissible in evidence in his own behalf.

A. I left them and went over to the corner of my fence and went up through across to my own home.

Q. Is that all of your answer to the question?

A. That is all.

Q. State what arrangement was made between Mr. Root
215 and Mr. Akin, at the time you mentioned, if any, as to Mr. Akin's living upon this land for Mr. Root and occupying it as a tenant. State the conversation that occurred at that time between Mr. Root and Mr. Akin, as well as between Mr. O'Brien and Mr. Akin in the presence of Mr. Root.

Objected to for the reasons hereinbefore stated, and also for the reason that the witness says that is all that he knows about it and leading.

Q. I went home. I did not hear that.

Q. Where were you and Mr. O'Brien and Mr. Root and Mr. Akin

at the time you saw them together, and at what time and in what year was it that you saw them together talking about this land in controversy?

A. That was on about the middle of June—that is, close up to the middle or the 20th.

Q. What year?

A. I believe I cannot recollect exactly the year. I have it here, if any one can read it. (Witness produces a paper.) I have no glasses. I have my paper here that will tell the year and date when I got it.

Q. This paper is dated the first of April, 1882?

A. Yes; I know, and that is the same year that Mr. Akin leased the land.

Q. What year is it that Mr. Akin leased the land?

A. It was in 1882. He came on the same year, but not so soon. He did not come on until the latter part of May.

Q. Who was it that made the arrangements with Mr. Akin to live upon the land—this land—for Mr. Root, if anybody, and at what place was it made—at whose house or whereabouts on the land, if on the land?

Objected to as leading and assuming a fact which has not been proven and an attempt to put words in the mouth of the witness.

216 A. It was Gen'l G. M. O'Brien and Theodore Gallagher. That was made—they were in front of my house, where I lived, when he came—the three together.

Q. Where did your house stand in which you then lived?

A. It stood on the east side of that 30 acres.

Q. What 30 acres?

A. The James E. North.

Q. State whether or not that 30 acres you mentioned contained the land in controversy in this suit.

A. No, sir.

Q. Where was it situated with reference to the land in controversy in this suit?

A. No, sir.

Q. Where was it situated with reference to the land in controversy in this suit?

A. It was between 65 and 70 rods from where Mr. Akin's house stood, right *kitty*-cornered across.

Q. Which way from where Mr. Akin's house stood?

A. It stood south and east.

Q. That is, the place where you were talking was south and east of your house—where your house stood?

A. Where I lived.

Q. Was Mr. Akin's house built there after that time or not?

A. It was built there after that time. There was no house there then.

Q. For whom was Mr. Akin occupying the land?

Objected to as being leading, suggestive, and attempting to put words in the mouth of the witness.

A. James E. North.

The cross-examination of this witness is waived by all parties.

The signature of this witness to this deposition is waived by all parties.

217 BYRON REED, sworn for the defendant, examined in chief by Mr. COVELL, testified as follows:

Q. State whether or not you have been introduced heretofore as a witness in this case.

A. Yes; I have testified in this case a few weeks ago.

Q. You may state how long you have lived in this country—Douglas county, Nebraska.

A. Over 30 years.

Q. You may state whether or not you at some time, perhaps in the year 1870 or thereabouts, made or had made a map upon which was shown the land in controversy.

A. I published a map in 1870 that showed this land with all the other land in the city.

Q. You may state whether or not upon that map was shown the names of the parties then claiming to own the land.

A. The names of the owners was put upon the different pieces of land quite generally throughout the map, but not in every case.

Q. You may state whose name was placed upon that map published by you as owning the land in controversy in this action, if within your remembrance.

A. I do not recollect.

Q. If the map contains the name of Allen Root as owning the land, is that the name that you had placed on there as being the owner of the land in controversy?

A. Yes, sir; if that name appears there.

Q. How long have you known Allen Root?

A. Over 30 years.

Q. You may state whether or not he, in the year 1870 and prior thereto and since then, to your knowledge, has claimed to be the owner of the land in controversy.

Objected to as immaterial, irrelevant, and incompetent and leading.

218 A. He has claimed to be the owner.

Q. When do you know that he first claimed to be the owner of the land?

A. I do not know when he first set up his claim of ownership.

Q. When was his first claim of ownership brought to your attention?

A. I cannot say with any degree of certainty, but I think it was between 1866 and 1870, or say between 1864 and 1870.

Q. What, if anything, do you know about his claiming to have been the owner of the land since 1870?

A. I do not recollect of speaking with him on that subject since 1870 until since the commencement of this present action.

Q. What do you know, if anything, about his improving the land in controversy in any way, and in what way, if any, did he improve it since he has claimed to be the owner of the land in controversy prior to the year 1888?

A. I do not know anything about his improvements on the land, although I may have heard it spoken of, but I have no personal knowledge of it.

Q. Have you any personal knowledge of there being a fence upon the land; and, if so, who put it there?

A. I think I saw a fence on the east line of that land, but I do not know who put it there.

Q. What kind of a fence was it, and when did you see it there first?

A. It was previous to 1870; a cheap kind of a fence, as near as I can recollect. I cannot say positively about there being a fence on the opposite side of the road, the main traveled road, running along the east side of this land, a road running between Hanscom's farm and this land on the east; I know the road was fenced, and on the east I think it was fenced at one time, but I am not positive.

219 Q. In what direction did this road run, north and south?

A. North and south.

Q. When Mr. Root was claiming this land you may state whether or not he did anything in any way towards laying it out into an addition, within your knowledge.

A. Nothing within my knowledge.

Q. You may state whether or not he had a consultation with you in regard to laying it out; and, if so, what was stated in that consultation, and when, if he had any such.

Objected to as immaterial, irrelevant, and incompetent, and, being a statement of Mr. Root, not in the presence of the adverse party.

A. I cannot say in regard to that. I have an idea that he spoke about laying it out into an addition somewhere about 1868; that is a very dim recollection and I do not know what was said about it; it was a matter which did not concern me in the least and I did not pay any attention to it; but I do think I heard him say something about it, but what it was I do not know.

Cross-examination by Mr. WOOLWORTH:

Q. You say you do not remember any conversation with Mr. Root in which he said that he claimed the land after 1873?

A. I do not recollect any; no.

Q. Did you have any other knowledge of his claiming the land besides what he said and what he may have said to you after that time, 1873?

A. No, sir.

Q. Is it not a fact that the plaintiff in this case has been the generally reputed owner of that property from that time, 1873, down to this time?

Objected to as incompetent, immaterial, and improper cross-examination.

A. I think very likely that is the case.

The defendant moves that the answer of the witness be stricken from the record as incompetent.

BYRON REED.

220 JAMES H. CURRY, sworn for the *plaintiff*, examined in chief by Mr. COVELL, testified as follows:

Q. In what county and State do you reside?
A. In Douglas county, Nebraska.
Q. How long have you resided in Douglas county, Nebraska?
A. I think I got here about the 8th of April, 1867. I think it was the 8th.
Q. Where did you formerly reside prior to coming to Nebraska?
A. In Indianapolis, Ind.
Q. How long did you live in Indianapolis, Indiana?
A. I was there twenty-seven —, living through the State.
Q. You may state if you lived at any other place in Indiana than Indianapolis; and, if so, in what year?
A. I lived in Park county in 1840 and I think I left there in 1848 and moved to Hendricks county, Ind., and I lived in Putnam county. I worked on the Indiana Central road for a number of years and then went to Richmond, Indiana, then within eight or ten miles of there.
Q. State if you knew a man at Richmond, Ind., by the name of William S. T. Morton; and, if so, when you knew him.
A. He lived, it appears to me, at Centreville; that was six miles. I knew him and seen him every few days.
Q. State what you know about his claiming the land in controversy in this action about the year 1873 or 1874. State what occurred between you and him at that time respecting the land
221 in controversy in this action, which is the land upon which Mr. Root now lives.

Objected to as calling for the testimony that is immaterial, incompetent, and irrelevant.

A. In 1873 I went on there and I owned a little property in Indianapolis; I went on to sell it, and while I was in a barber shop I talked about selling this property I had there, and Mr. Morton was over at Indianapolis and was in the shop getting shaved; at the same time he wanted to know where I was from and I told him, and he wanted to know how I came to wander way out here and I told him I thought I could do better; he told me that he had a piece of land that he would like to swap off for my property there. I asked him what it was and he told me it laid close to Omaha; I told him

if I did not sell that I would come back and look at it; that it was a kind of a hilly country; the city was all right then; I had never been out ten miles in the country and I would look at it; he gave me the numbers and the section of the land and I did not sell, and when I came out here I got here in three or four days before Christmas in 1873—in the spring—and I stepped into Mr. Reed's office and showed Mr. Reed's clerk a paper that he gave me and told him I wanted to go and look at that piece of land, and he made it out for me, and in a month or so after I got that I went out to where the land was one Sunday. I kept inquiring until I found it; I found a man on it; I asked him who owned this land——

222 Objected to the witness stating a conversation with some person who was in no way a party to this suit and in the presence of other of the parties or of Mr. Morton, whose conversation is called for by the original question; that the whole thing is irrelevant, incompetent, and immaterial.

The WITNESS: I found a man on it; I told him I was looking for that piece of ground, and I asked him if that was correct as to the numbers and he said it was. I asked him if that did not belong to Mr. Morton and he said no, it did not; he said that he was a renter there of Mr. Root's; he said he was a renter of Mr. Root, and I asked him if he was sure and he said he was. Then I just came back to town and never bothered after it any more. I came back to the office when I found a man was on it, and the man in the office told me when I found a man was on it—and the man in the office told me that he thought the ground belonged to Mr. Root in Mr. Reed's office. I went to see him and saw it was, and I then wrote to Mr. Morton and told him that his land belonged to somebody else, and that is all there is of it with me. That was all between me and Mr. Morton.

Q. Who was the man that you found living upon the premises in controversy?

A. It appears to me his name was Pierce.

Q. What year was that that you found him living on the land?

A. That was in the spring of 1874.

Q. Were there any buildings upon the land other that the

223 *the* building he occupied?

A. It appears to me that he had a stable that stood south of the house and some trees around it.

Q. What was the condition of the land when you went out to look at it; whether it was cleared or not—covered with brush?

A. It was some clearing, the same that you would put on a place of that kind, around. I do not recollect how much of it, but there was some timber on it, as I recollect; there was some timber on it.

Q. Was he occupying a cabin there; and, if so, whereabouts was it situated?

A. Yes; he had a house. I do not know what kind it was—a common, cheap house like a poor man would have. The house that he lived in was north of this little barn that he had, I think, as well as I recollect.

Q. Do you know whether or not the street that is now in Poppleton avenue, running on the south side of that land, *or* was south of his cabin or not?

A. Yes, it was south of it; it was south of the barn.

Q. How far north of what is now called Poppleton avenue was his cabin and barn situated, if you know, at that time?

A. At that time there was nothing but a road there; a little kind of a road. It was not a great ways; it was close by; it could not have been far off.

224 Cross-examined by Mr. POPPLETON:

Q. What is your age?

A. I was born in 1832.

Q. You are 57 years old?

A. Yes, sir.

Q. When did you come to Nebraska?

A. About the 8th of April, 1867; within a day or two of that; I think it was the 8th.

Q. You have been here 27 years?

A. Yes, sir.

Q. Where were you born?

A. In Guilford county, North Carolina, six miles west of Greensborough, the county-seat.

Q. Free or a slave?

A. I was born free.

Q. When did you go to Indiana?

A. In 1840, about the first of November.

Q. What was the first place you went to in Indiana?

A. I stopped out in the country; it was nine miles from Rockville, northwest; and came there with the Coffins. They had a big foundry there.

Q. What year did you go to Richmond?

A. I use- to go to their yearly meeting. They were Quakers, and I use- to go every year to their yearly meeting at Richmond. I think the first time I went there after we landed in Indiana I think it was in about 1844.

225 Q. When did you go there to live?

A. I went there to live, I think, in 1851. It was either 1851 or 1852. I think it was 1852.

Q. You were there first in 1844 to a Quaker meeting?

A. I think some time about that time. We had been in Indiana for perhaps maybe three or four years and after that I went most every fall.

Q. Did you go alone?

A. Sometimes. My father and mother lived north of Richmond nine miles, at a little town called Newport.

Q. Did you know Mr. Morton at that time?

A. Not so early as 1844. I knew Mr. Martin as early as 1850.

Q. Where did you say he lived, at Centreville?

A. I think he did. I think he lived on a farm when I first knew

him. I use- to see him come in every few days when I worked in Richmond along in 1856, I think.

Q. What was his business?

A. I never knew his business. I thought he was a farmer.

Q. When you lived there did you have any personal acquaintance with Mr. Morton?

A. Nothing; only he would go into the hotel and come out, and they would call him Mr. Morton.

Q. You never spoke to him?

A. Yes, sir. He knew and spoke to me many times.

Q. What were you doing that brought you in contact with Mr. Morton?

A. I was working in the hotel barber shop.

Q. You were a barber then?

A. Yes, sir.

226 Q. And have been ever since?

A. Yes, sir.

Q. Where was it in Indianapolis that you say you met Mr. Martin when you went back from Nebraska?

A. I met him on the corner of Washington and Pennsylvania and Virginia avenues. It comes into what is called Vance block.

Q. That is where you had your conversation with him?

A. Yes, sir.

Q. On the corner of these streets?

A. Yes; in the barber shop.

Q. What were you doing?

A. I was doing as now. I went back to sell some land and my foreman that use- to be owned the shop and I staid there nearly a month and worked in the shop to help him out.

Q. Did you ever see Mr. Martin there more than once in that shop?

A. I do not think I did.

Q. Can you give the day or time of day?

A. I do not recollect.

Q. Was it in the day or night?

A. It was in the daytime.

Q. What were you doing in the barber shop?

A. We were at work. I went there and while I was there laying around his house I helped him out. He had an extra chair.

Q. You say you shaved Mr. Morton?

A. No. I do not say I did because I did not do it.

227 Q. You were trying to sell this land in that shop?

A. I was talking.

Q. Of selling your property in the barber shop?

A. In the barber shop I was talking about selling it.

Q. To whom?

A. To the man that owned the shop.

Q. How long had you been there when you had this talk?

A. I think that was perhaps a week maybe before I came away.

Q. You had been there three weeks?

A. Yes, sir.

Q. Had you talked about selling this property in the shop before?
A. From the first day I got there.
Q. You talked every day?
A. Yes, sir.
Q. It was a common thing. You were talking all of the time in the shop?
A. I did not talk all of the time, because there was no use of talking to a man that could not buy. William S. Hubbard was my agent, and I told him the first day I got there I wanted to sell it and he was trying to sell it.
Q. Did you offer this property to Mr. Morton when he came in?
A. No, sir; me and the man that owned the shop were talking.
Q. You were talking with somebody else about the land and Mr. Martin took up the conversation?
—. He told me that he had a piece of land out here that he would swap for it.
228 Q. You knew Mr. Morton when he came into the shop?
A. I knew him from along in about 1852.
Q. When he came into the shop you knew who he was?
A. I did not know that I noticed him when he came in.
Q. Did not he ask you where you lived?
A. No, sir.
Q. Why?
A. My talk was about the land. He asked me where I was from and I told him he knew me. He not only knew me, but my father.
Q. If you went there to sell this property, why did you not offer it to him?
A. I did not know that he wanted to buy it.
Q. You did not know anybody wanted to buy it until you tried them?
A. I did not know they did until I went and offered it.
Q. You did offer it to everybody in the shop that you thought there was any possibility of buying it?
A. No, sir; I thought Mr. Hubbard could sell it better than I could, but if I could assist him I would do so. I wanted to sell it and come up and invest.
Q. Did you see Mr. Morton again after that?
A. I do not think I did. We never had any talk only there.
Q. That was the only conversation you had about the land?
A. Yes, sir.
—. Did he tell you how he got this land?
A. He did not tell me nothing about it.
Q. How much land did he say he had?
A. He told me there was, it appears to me, 20 acres or something along in there. I know there was not much of it.
229 Q. Did he say anything about having any more land in Omaha?
A. No, sir; he did not.
Q. Did he say that was all he had?
A. No, sir; he did not say that.
Q. Did he talk as if it was all that he had?

A. He did not talk about any more land than this piece.
Q. He wanted to swap that for your property?
A. Yes, sir.
Q. What was the property that you had?
A. Three lots and two houses.
Q. Where?
A. In Indianapolis.
Q. Where were they?
A. With reference to the business portion of the city, on Washington street, on what was called West Indianapolis.
Q. What were they worth in cash at that time?
A. I could have got seven thousand dollars for them. Hubbard told me they were worth that, and I wanted to sell and he said I better hold on.
Q. Give a description of those lots, the numbers and block.
A. I cannot tell the number without going to the house and getting the old deeds that I have there.
Q. How long did you own them?
A. I bought them during the war.
Q. Did you build the houses on them yourself?
A. Yes, sir.
Q. You say you do not recollect the numbers of these houses?
A. No, sir; I do not recollect the numbers. They were
230 the third houses——
Q. Who did you buy them of?
A. I bought them of the man that owned them; his name was Mc something; I cannot think of it.
Q. Did you buy them all of one man?
A. Yes, sir. He owned the farm of 120 acres, and this came right off to the street.
Q. You cannot give his name?
A. I could find his name on some receipts at the house, I think, when I sold the land which I sold to William Hubbard. I sold him all of them.
Q. Did you build the houses?
A. I paid for them.
Q. They were put on the lots after you got them?
A. Yes, sir.
Q. They were not there when you bought?
A. No, sir.
Q. Who did you sell them to?
A. William S. Hubbard.
Q. Your agent?
A. Yes, sir.
Q. For how much?
A. I think I got in a roundabout way about $600.00. I sold while I was in the basement of Dick McCormick. He went on and sold them for me.
Q. When was that?
A. That was when I was in the basement, on 15th street
231 and Farnam, under Frank E. Moore's office.

Q. Six the year.
A. I cannot without going to McCormick.
Q. Do you mean that you got $600.00 for the whole?
A. Yes, sir.
Q. And these are the lots that Mr. Martin exchanged for this land or offered to?
A. Yes, sir.
Q. In that conversation you say that Mr. Martin gave you the numbers of this ground?
A. Yes, sir.
Q. What were they?
A. I think the west half of section 28, I think. I may have that paper among my old papers at home. I generally try to keep my papers that amount to anything. I put them away.
Q. When you got home you went out there to see it one Sunday?
A. I got home two or three days before Christmas, in 1873, and then I went in 1874 to look at these lots. I was there in 1873.
Q. You were in Indianapolis in 1873?
A. Yes, sir.
Q. And came home about Christmas, 1873?
A. Yes, sir.
Q. And went out in the spring of 1874 to see it?
A. Yes, sir.
Q. This property?
A. Yes, sir.
232 Q. Was it after the snow was off the ground?
A. Yes, sir; it was pretty late in the spring.
Q. Who went with you?
A. I think I took one of my barbers. I do not recollect who it was.
Q. Did you look at the map and make any inquiry about the property before you went out?
A. I went to Byron Reed's and they told me where to find it.
Q. Did you ask anything about the value of it?
A. No, sir.
Q. Did they tell you what the value of it was?
A. No; because I did not ask.
Q. You understood there was about 20 acres of the land?
A. Something near it. It was not a regular subdivision, but an irregular piece. It appears so to me now. I might be mistaken, but I know there was not much land.
Q. Was it prairie or timbered land?
A. It was timber. There was some timber there when I was there.
Q. Mostly timber, was not it?
A. I could not say that.
Q. What I mean is this undergrowth—not timber, perhaps, but undergrowth.
A. I do not know. I do not recollect. I know I walked up from the lower point of it and came up. I think it was cleared off some, but it appears to me that the biggest trees were left standing.

233 Q. Did you examine the boundaries of that tract of land when you were there?

A. No, sir.

Q. Who showed you the land?

A. A man named Pierce.

Q. He is the man that you saw was in the cabin there?

A. He was in the house, whatever kind of a house it was, a small house.

Q. Did you ever see him before?

A. Yes; I have seen him before.

Q. Where?

A. In my shop.

Q. You had shaved him?

A. Yes, sir; and had his hair cut.

Q. What was his occupation?

A. It appears to me, as well as I recollect, that he was a carpenter. He followed carpentering when he was in town, I know.

Q. How do you know?

A. Because I lived upon the same lot that he did. He lived in the back and I in the front of the lot.

Q. Where is that?

A. Where Frank Ramge's building stands.

Q. You lived in the front?

A. Yes, sir.

Q. And he lived on the alley?

A. Yes, sir; I think his house fronted on the street. It did front on the street.

234 Q. Was that after or before you went up and examined the land?

A. It was after.

Q. He left the land afterwards and came and lived on this alley?

A. No, sir; he must have went there when he left the alley.

Q. I understand you to say it was after you examined the land?

A. No, sir.

Q. It was before that he lived on the alley?

A. Yes, sir; he had moved away from there and once in awhile he would come in and got his hair cut, but I had forgotten him and thought he had left town entirely.

Q. Until you found him up there?

A. Yes, sir.

Q. Did you start out to find him—do you know how long he lived there or did you stumble onto him accidentally?

A. No; I went to this land and found him there.

Q. Do you know that Mr. Pierce was there when you went up there?

A. No, sir; I do not know that anybody was on it at all, but this man told me that he thought there was a man on.

Q. When did you first know Mr. Pierce was living on that alley? Did you ever know him until you knew him there?

A. I never knew him. He had been shaving with me for several

years—more than one year, anyway. I did not know him. I did not know what his name was until I moved on the alley.

235 Q. How long was that before he went up onto this piece of property?

A. I do not know just what year it was that I went there. I have forgotten how many years I lived up there. It is easy to find out from Byron Reed.

Q. Who owned the lot?

A. I do not know. It belonged to some Eastern parties. Byron Reed was agent.

Q. He owned the whole of the lot; Byron Reed was agent for the whole of the lot?

A. Yes; the corner lot.

Q. You and Mr. Pierce rented from the same man?

A. Yes, sir.

Q. How long did the parties live on that lot while you were there?

A. I do not recollect. I do not know whether I moved out before he did or not. It appears to me that I moved away before he did, because I bought the lot on Jackson street, in this city. It appears to me it was in 1870.

Q. What kind of a house did Mr. Pierce live in on the lot?

A. It was a little frame house.

Q. One story?

A. Yes; one story, with two rooms in it.

Q. What kind of a house did you live in?

A. I lived in that house that stood there for years fronting on Jackson.

Q. I am speaking of the Ramge lot, where you say you lived. You were living in front and Mr. Pierce in the back?

236 A. Yes, sir.

Q. What kind of a house did you live in on that lot?

A. In a frame house that had been there 40 years, I believe.

Q. What rent did you pay?

A. Eight dollars a month.

Q. What did Mr. Pierce pay?

A. I do not know.

Q. How did it compare with yours? Was it as good or not?

A. It was an ordinary frame house.

Q. Was he a single or married man?

A. A married man.

Q. What family?

A. I do not recollect.

Q. How old was Mr. Pierce?

A. He was a man perhaps maybe 44 or 45, or something of that kind.

Q. At that time?

A. No; now; and I have forgotten what year he moved there. He was not an old man at that time.

Q. Have you ever seen him since?

A. I do not recollect. I could not recollect that, because there was no trading and nothing to make him know me.

Q. You will swear that you have never seen Mr. Pierce since you saw him on that land that day?

A. No; I won't do that.

Q. Notwithstanding you had lived with him a year on this alley?

A. I did not live with him. He lived on the alley and I lived on the street.

Q. You saw him when he was there?

A. I left in the morning and did not come home until one
237 or two o'clock for dinner and ten or eleven o'clock at night when I got home. There would be weeks I would not see him.

Q. Do you know where Mr. Pierce is?

A. No, sir.

Q. Do you remember any conversation with anybody about it?

A. No, sir.

Q. You are certain you never saw him from the time you saw him that Sunday on the place?

A. If I do I don't recollect it.

Q. Who last occupied that lot that was occupied by you and Mr. Pierce at the time that you were there? Was there any other building on the lot?

A. This was a double tenament I lived in. I lived in the east half and there was a colored family lived in the other half awhile, and it appears to me that there was a white family lived in there, I think, at the time Mr. Pierce did, that lived in the west end of the house.

Q. Were there three families there?

A. Yes, sir.

Q. And Mr. Pierce lived on the alley?

A. Yes, sir.

Q. You say that is the lot where Mr. Ramge's block now stands?

A. Yes, sir.

Q. Your house fronted on Harney street?

A. Yes, sir.

Q. A double house?

A. Yes, sir.

Q. The house that Mr. Pierce lived in was on the alley?

238 A. Yes, sir.

Q. What was the name?

A. His name was Pierce.

Q. What were his initials?

A. I do not know. I always called him Mr. Pierce.

Q. You never heard anybody speak his name?

A. No; I never heard anybody call his name, only Mr. Pierce.

Q. When you went up there that Sunday did you trace out the boundaries of this land?

A. No, sir.

Q. Did you attempt to?

A. No, sir: there was nothing for me when I found that somebody else owned it. I did not want nothing to do with it.

Q. You found that out from Mr. Pierce or supposed you did?

A. Mr. Pierce told me that the land belonged to Mr. Root and he had rented it and was living on it, and when I asked the numbers of the land they said they thought somebody else owned it, and I told him I thought not. Well, he said, I think there is another man in the country that owns that land.

Q. That was in the spring of 1874?

A. Yes, sir; I think it was in the spring of 1874.

Q. What time?

A. I went to Indianapolis in 1873 and——

Q. At that time was there any fence on the south side of the land near where Poppleton avenue is now, or did you not notice?

A. I do not know that I noticed. There was something, it appears to me, to the east of it.

239 Q. When you went to the house that day you went into the house where did you find him?

A. Standing at the door.

Q. Outside?

A. Yes; he was standing at the door.

Q. You did not go into the house at all?

A. No, sir.

Q. What kind of a house was it?

A. It appears to me it was a little frame house, I think; I would not be sure. I know there was a house there. I think it was the house that was made of boards; I think it was.

Q. Was it a frame, regular frame?

A. I could not say.

Q. Was the house weatherboarded?

A. I think so.

Q. Was it shingled?

A. Yes; I think so.

Q. How many rooms?

A. Judging from the size, there might have been three small rooms, but I could not tell anything about it.

Q. What would be your recollection of the dimensions of the house—how long?

A. I do not know as I could tell that. I did not pay any attention to it.

Q. How wide?

A. I suppose the house would be—maybe 15 feet or something like that. It was something I paid no attention to.

Q. It was only one story?

A. Only one story.

Q. But it was a house large enough so it might be divided into two rooms?

A. I would think so. I did not pay but very little attention to the house, because when I found that the land was claimed by somebody else——

Q. You just came right away, and did not talk about it any more?

A. Yes; we stood there and talked maybe half an hour and maybe not so long.

Q. You say that that house was north of Poppleton avenue as now located?

A. Yes, sir.

240 Q. Have you been up there to see where Poppleton avenue is located and to look over the ground?

A. No, sir.

Q. Have you ever been there to examine the ground since Poppleton avenue was opened?

A. No, sir; but I know there was a road in there.

Q. In respect to the location of this house you are testifying to from the road—that is, it was north of the road?

A. Yes, sir.

Q. Then you really did not know where Poppleton avenue does run with respect to the house?

A. Yes; I know where it starts in at off of these other streets.

Q. Have you been there to locate the spot where this house stood and see where it is with reference to Poppleton avenue since it has been opened up?

A. No, sir.

Q. In respect to the location of the house, *that* you are testifying as to the impression that you had when you were there?

A. Yes, sir.

Q. And not as to any examination that you made lately?

A. No, because I had no occasion to make any; but I know where Poppleton avenue starts in at and then runs straight.

Q. How far was the stable from the house?

A. It was close by. It was not a great ways off.

Q. Was it south or north?

A. It was south.

Q. South of the house?

A. Yes; I think it was south of the house. I think the house was north of the stable.

Q. Did you go out to the stable that day?

A. No, sir.

Q. What kind of a stable was it?

A. It appears to me it was a board stable. I know they had a board top to it.

Q. But you did not go to it?

A. No, sir.

Q. Did you go further south than the house?

A. No, sir.

Q. You did not go over even to the stable?

A. No, sir.

Q. Do you know whether there was any house south of it?

241 A. I do not recollect. My best recollection is I do not know that I saw any house around there; there might have been.

Q. Except this one?

A. There might have been other house. All I went there for was to see the land, and when I found out that somebody else owned the land that was all of my interest in it, anyway.

Q. So that you did not pay much attenion to what was there at the time—but the surroundings, you glanced over it and came back?

A. Yes, sir.

Q. How far was the house from the road that you speak of?

A. I could not tell you, but it was not a great ways.

Q. It was north of the road—the house was?

A. The house was north of the road.

Q. At it run, then, at that time?

A. Yes, sir.

Q. How far north? Come as near it as you can.

A. It might have been 20, 30, or 40 steps. I know it was not a great ways.

Q. Was it 50 feet?

A. It likely would have been 50 feet.

Q. Was it 100 feet?

A. It might have been. I know it was only a few steps.

Q. What do you mean by a few steps—paces, such as a man would measure land with?

A. Yes, sir.

Q. Was it 30 paces?

A. I think it was. I think it might have been more than that.

242 Q. Was it 40 paces?

A. I cannot guess. It has been some time ago. I was there once.

Q. State where that road was located—where it started into the land or near the land, and what direction it went.

A. I do not know nothing about the corners of the land. From this house it was, I say, a few steps; maybe 40 steps, or it might have been more. It was not a great ways from that, but I could not tell what. I do not know the corners of the land at all.

Q. Are you speaking of the road that run up Leavenworth street, where it is now located, or the road that went up over Hanscom's ground and went off in the direction of the corner where Howell lives, south of the poor-house?

A. I do not know Howell. I was at the poor farm once.

Q. Really, you do not know much about that locality?

A. No; I only know about where I went to look about that land.

Q. Can you tell upon what road did you go there? Describe the road that you took to get there.

A. When I went out here it was more across lots than anything else; when I went out.

Q. Did not you go along the road?

A. Yes; I went up to St. Mary's avenue, and there they gave me the directions they gave me here, and said I could follow the road around and get through there and find it, and I went to St. Mary's avenue and went through lots of woods.

Q. Off from the road entirely and go through the woods?

A. No; when I came back I came this road.

243 Q. You followed a road all the way going out?

A. No; I went across through the woods.

Q. Where did you leave the road, and from what direction did you approach the house?

A. I came up to the house from the north.

Q. That is, you left some road that run north from the house?

A. Yes, sir. It must have been what you call the Leavenworth. That was a common county road and very hilly at that time. I went until I came to a hollow, and I think I met somebody, and then we went right through the woods, rather southwest; then when I came back I told him it was a pretty hard place and found no roads, and he told me that that road lead down town, and so when we came back we went that road.

Q. You went south from the house until you reached the road, when you came back?

A. Yes; we did not have to go but a few steps.

Q. 30 or 40 steps?

A. I think so; it may have been more than that.

Q. Were you ever on that road further west than that place?

A. No, sir.

Q. And never came—in coming in where did you go?

A. I took the road and kept it until I came right into town.

Q. Where did it run?

A. I think we came down what was called St. Mary's avenue.

Q. Did it come on to Leavenworth street or keep over Hanscom-Park hill towards Park avenue?

A. No; I came back and got to Leavenworth street somewhere. It appears to me that we came down to a road to where what is now the park, I think I struck a road.

244 Q. There was somebody with you?

A. Yes; I had a barber.

Q. Do you know his name?

A. I do not recollecy.

Q. Do you know where he is?

A. No, sir.

Q. Could you locate him if you saw him?

A. No. I think his name is on my books, but I do not know who it was. I talked to him, and he said he wanted to go along.

Q. Have you talked with Mr. Root or Covell about this case?

A. Mr. Root found out that I knew something about it from some source or other. He came to me and wanted to know what I knew about it.

Q. When was that?

A. I guess it must have been a couple of months ago, and he wanted to know if I knew anything about it.

Q. Did he enter into an explanation of his claim to the land? Did he tell you about it—give you the boundaries and description of the road?

A. No, sir.

Q. Did he tell you anything about Mr. Pierce?

A. No, sir.

Q. Did you ever have any talk with him about Mr. Pierce?

A. No; nothing about Mr. Pierce.
Q. He never said anything to you about Mr. Pierce?
A. No; he only wanted to know what I knew about it.
Q. You went on to tell him about Mr. Pierce?
245 A. I told him what happened; just what I knew about it; that is all I know.
Q. Fix the location of this house upon the land with reference to the western and eastern boundaries.
A. I did not know where the boundaries were.
Q. Was the house on the level?
A. It was on a ridge.
Q. Directly on the crest of the ridge or on one side or the other?
A. It was pretty near, I would think. I know there was a hollow, or what you call a draw, on each side of the house. It appears to me about the east of it was a pretty deep one, and to the west of it, which was close by, was quite a *dreen*, or water would run down that way.
Q. State whether the house stood on the crest of this back of land or whether it stood on one side or the other side of this crest, and on which.
A. It may have stood to the west—a little to the west. I think likely that was the case.
Q. Do you have any definite recollection about it?
A. I have a definite recollection that the hollow to the east was greater than the one to the west.
Q. Was there any ridge to the east of the house or did the house stand on the crest?
A. I could not say.
Q. How about the stable? Did it stand on the crest or one *one* side or the other?
246 A. It stood back of the house.
Q. Did the house stand in the timber or prairie?
A. In the timber.
Q. Did the stable stand in the timber?
A. Yes, the stable stood in the timber.
Q. Both have been set in the timber there—both buildings?
A. There appeared to be some trees around; I could not say how many. I know they were not all cleared off.
Q. Did you see the house before you got to it?
A. Yes, sir.
Q. How far?
A. I could not see it very far off; a couple of hundred yards.
Q. How about the stable? Could you see that?
A. I did not notice the stable. It appears to me that the stable stood almost behind the house. I was coming this way, and the house stood off here and the stable back of it, and I do not think I saw the stable until I got to the house. I might have, but I do not recollect.
Q. How long did you own those lots in Indianapolis?
A. I think I bought them in 1863.
Q. And sold them when?

A. I sold them—I cannot tell you when without I have my papers. I could tell you exactly then. It was in 1880 that I sold them. I could tell to the very day.

Q. You bought them in 1862?

A. Yes; two or three. Sixty-two or sixty-three.

Q. You sold them in 1880?

A. It was long after 1880. I went out in September, five years ago, to McCormick's.

247 Q. Did you ever know of another man named Pierce in Omaha except this one?

A. There use to be another Pierce here; he use to come to get shaved and his hair cut, but he had something to do with the poor farm, and why I recollect it they had some trouble one way or another.

Q. That was not the man that you were talking about?

A. No; it appears to me that that Pierce was a taller man and this other was a heavy man.

Q. Was he a boss carpenter or contractor or working by the day?

A. I do not know about that.

Q. Do you know who he worked for?

A. No; I do not.

Q. Did you ever see him at work?

A. I do not think I ever saw him at work.

Q. How do you know he was a carpenter?

A. I would see him going with his tools—his carpenter tools. That is the way I knew he was a carpenter.

Q. You do not know who he worked for or where he worked?

A. No, sir.

Q. Nor when he begun?

A. No, sir.

Q. You have never seen him *you* since you saw him up on the ground that day?

A. I might have seen him in town.

Q. You have no recollection of it?

A. No, sir.

248 Q. You cannot give his initials?

A. No, sir.

Q. You do not know whether he was married or single?

A. Yes; there was a woman there, anyway.

Q. You do not know whether he had any children?

A. To the best of my recollection he did not have any, and they might have had. It would be early in the morning when I left and way in the night when I would come back.

Q. Describe the man's appearance. Would you say he was short or thick set?

A. Yes, sir.

Q. Was he light or dark complexion?

A. It appears to me that he was kind of reddish complexion. He looked a good deal like an Irishman. He had a kind of a twang. I do not know whether it was Irish, Scotch, or what.

Q. He was not a colored man?

A. No, sir; if I could be that white I would have an equal chance with white men, but I cannot do it.

Q. You say there was a colored man or colored family lived in the same building with you on that lot?

A. Yes, sir.

Q. Can you give their names?

A. Williams.

Q. Are they here now?

A. Yes, sir.

Q. Who are they?

A. It is a Mrs. John Williams.

Q. Where do they live?

A. I could not say whether they lived there when this man lived there, but it appears to me that there was a white woman
249 lived in there.

Q. Where is Mrs. John Williams now?

A. She lives in one of Chapman's houses on 14th street. It appears to me the first one from the alley going south. She lives between Jackson and Howard streets after crossing the alley below.

Q. Jackson and Howard streets, on Fourteenth?

A. Yes; I think they have a house right close to the alley.

Q. How long did she live in the house on the same lot with you?

A. She lived there it appears to me and I to she; it appears to me that I moved away and left her there.

Q. What was she, a widow?

A. Yes; she married; she is married now.

Q. Is her name Williams now?

A. No; she married a man named Early.

Q. What does he do?

A. He is working at Milton Rogers & Sons for eight years.

Q. In the store?

A. Yes, sir.

Q. In what capacity?

A. Janitor and porter, but I would not swear that they were living there when this man was there, because I hardly believe they were, and yet—but I do not know.

Q. How long did Mr. Pierce live there on that alley to your knowledge? Did he live there a year?

A. I would not say that he did, because I do not recollect; there was several moving in and out. Charley Mansfield lived
250 there a good while—first one and then the other. I could not say anything about how long they lived there.

Redirect examination.

By Mr. COVELL:

Q. How long do you know of Mr. Pierce having lived upon the land that you went up there to see in the spring of 1884?

A. I do not think that I know. It was the first time I had seen him for a long time. I supposed he had gone, that he had

left the country entirely, and when I went there and spoke we got to talking and I asked him if he had been living there ever since he lived in the alley, and he said that he had been living there all that time, but I do not know how long, because I do not recollect how long it had been since he had went off the lot, but he had been away surely for a year or two—a year anyhow—because I had not seen him, and he used to come in and get his hair cut and whiskers trimmed. I could not tell anything about how long he staid there.

J. H. CURRY.

251 WILLIAM BATY, of lawful age, being by me first duly cautioned, examined, and solemnly sworn, as hereinafter certified, testified as follows:

Examined in chief by Mr. COVELL:

I live in Douglas county, State of Nebraska; have lived in Douglas county, Nebraska, 16 years.

Q. What has been your occupation shile you have been living in Douglas county, Nebraska?

A. The greatest portion of my time has been herding cattle until the last four years.

Q. When did you commence herding cattle, and where did you herd them generally?

A. In 1874 I hearded in Omaha—cattle from Omaha.

Q. Whereabouts were the cattle herded—on what land?

A. I herded on a piece of land out here beyond the park—west of the park—by the name of—I got it of O'Brien and Mr. North in 1874.

Q. West of the park? What park have you reference to?

A. Hanscom park.

Q. Do you know the land where Mr. Root now lives—Allen Root?

A. I could not say where he lives now.

Q. Do you know the land known as the northwest quarter of the northwest quarter of section 28, 15, 13?

A. I might not know it by that name, but I know a piece of land out there east of the poor-house. I never went particularly as to the numbers or anything of the kind.

252 Q. Do you know where Poppleton avenue now is?

A. Yes, sir.

Q. Do you know where it strikes the poor farm?

A. Yes, sir.

Q. Do you know the land directly north of Poppleton avenue?

A. I know it; yes, sir.

Q. State whether or not you herded cattle on that land; and, if so, when.

A. Yes; I hearded on that land north of Poppleton avenue.

Q. Between what streets running north and south?

A. The streets were not named at that time. I could not say.

Q. Do you know where 22nd street is now?

A. No; I could not say. Since I herded cattle out there I do not

know but very little about the country out there, it has been settled up so. The streets have been changed so I could not say anything about that.

Q. Do you know where August Doll formerly lived?

A. Yes, sir.

Q. State whether or not you herded your cattle upon the south of the land where Doll lived and east of the road which runs on the east side of the poor farm.

A. Yes; I herded south of where Doll lived.

Q. Was or was not that land north of Poppleton avenue and south of Doll's and east of the poor farm?

A. This land was north of Poppleton avenue. I do not think it joined or connected with the poor-house farm really; yes; I
253 believe it did, too. It has been so long since I studied over those things. When I was there I paid attention but to my business. I think that street, since you mentioned it, did come out against the poor-house farm—maybe a hundred or nearly a hundred yards from the north line of the poor-house farm.

Q. You may state what years you herded cattle on that land.

A. I took possession of that land in 1874, in June, I think, to the best of my recollection, and occupied that land up to 1879.

Q. In what way did you occupy it?

A. With cattle.

Q. You may state whether or not there was a house and stable on that land. And, if so, when did you first see the house and stable on that land?

A. I could not just state that precisely, but it was in my time that I noticed it. It might have been in 1877. I would not be positive now. I know there was a lit-le house and a little stable stood there right in the brush.

Q. Whereabouts on that tract of land did it stand?

A. It stood north of Poppleton avenue, a little north. The stable stood still north of the house.

Q. Which side of the ridge was it found?

A. It was rather on the west side.

Q. Which ridge do you have reference to? Is it the ridge near the middle of the tract of land running north and south?

A. I cannot just state that. On the south side of that there
254 was a portion of land fenced there, and from that west fence, west line fence that run directly south. I think that little house stood some seventy or seventy-five feet from the fence.

Q. Which way from the fence?

A. West.

Q. What kind of a fence was it that you have reference to?

A. It was a plank fence.

Q. How long did that house stand there within your knowledge?

A. That house and stable, I could not just recollect that.

Q. Up until when?

A. It stood there—I would not be positive about that, but I think, if I am not mistaken, it was there in 1880.

Q. Was that house occupied?

A. No; not the entire time. It was occupied when I first knew there was a house there.

Q. How long was it occupied, if you know?

A. I could not really state how long; my business only called me there in the summer seasons and fall, and in the winter time. I could not say how long it was occupied.

Q. During the summer season when you were herding cattle?

A. I think it was as long as I went out there.

Q. When did you cease herding cattle there?

A. I ceased there in 1879. I passed through there once or twice after that with my cattle.

Q. Did you pass over this tract of land on which you say there was a house and stable?

A. Yes; I passed over a portion of that.

Q. Who was understood -o be the owner of the land at the time that you were herding there?

255 Objected to as immaterial and irrelevant.

A. The land on which the little house stood I could not say. I could not answer that question.

Q. Was the house or not occupied during the summer months while you was herding there?

A. It was the first summer that I noticed the house there. I think that was in 1870, if I recollect right.

Q. Do you mean in 1870 or 1877, when you first saw it?

Objected to as leading.

A. 1877.

Q. Do you know by whom it was occupied—the house?

A. I could not say. I have seen him, but I do not know as I heard his name in particular. I might have heard it and forgetten it.

Cross-examined.

By Mr. POPPLETON:

Q. I understand you to say that you had not looked at that ground very lately?

A. Well, no; I have had no particular occasion to go out there lately.

Q. You looked at it when, you say?

A. It was about 1887 or 1889; somewheres along there—1889.

Q. You have never paid any special attention to it since?

A. Not in particular since.

Mr. WOOLWORTH: Do you mean that you left it in 1889 or 1879?

A. I had passed through it after that; I passed through and occupied a portion of that ground in 1879?

256 Q. You said 1889.

A. In 1879? *A.* In 1879—I was mistaken; but I did not make it my business there.

Q. You mean 1879 and not 1889?

A. I was in there in 1889 and passed through until 1879; I herded a portion of my cattle in about Griffin's.

Q. What were you doing in 1889?

A. Herding still.

Q. What time in 1889?

A. I passed through; I was not particulary herding on that ground at that time, only passing through it.

Q. That was in 1889?

A. That part of it there I did not pass through.

Q. When was that, you say?

A. That was in 1877 when I occupied all of that land.

Q. When did you say you were there last?

A. I had passed through up to 1879.

Q. When did you say you were there last?

A. I passed through up to 1879 off and on.

Q. Since 1879 you have paid no attention to the land?

A. I have not paid any attention particularly to it at all.

Q. That is ten years ago?

A. Yes, sir.

Q. You say it was settled up so and changed so that you do not recollect much about it?

A. There was no streets there at that time.

257 Q. Have you been up there to look at that house and stable since that time that you speak of lately?

A. I was there a few days ago.

Q. Who went with you?

A. Mr.—I cannot recollect his name—Gallagher.

Q. What is his first name?

A. I do not know his first name.

Q. Theodore Gallagher?

A. It may be.

Q. Do you know whether he has given testimony in this case in favor of Mr. Root?

A. I think not.

Q. Is that the man (pointing to Mr. Theodore Gallagher)?

A. That is the man.

Q. Have you had any conversation with Mr. Root or Covell about going up there and looking the land over?

A. No, sir; I have not.

Q. Have you seen Mr. Covell in his office, or Mr. Root?

A. This gentleman is the first time I ever saw him now, and do not know his name.

Q. Has Mr. Root talked to you lately about this matter?

A. He has never talked to me; only to-day.

Q. Who has talked with you?

A. Nobody in particular.

Q. Has not Mr. Gallagher—you say that Mr. Gallagher took you up there?

A. I took myself up there.

Q. When was it that Mr. Gallagher was up there with you?

A. I cannot just say; it has been as much as three weeks
258 ago; it might have been more; I could not state just exactly.

Q. Can you tell, from your knowledge of that ground up there now and the location of Poppleton avenue, whether that house that you say was north or south of Poppleton avenue as it is now graded and cut out?

A. It was north, sir.

Q. Do you know that—how do you know it?

A. I know that by the fence that was there; I know it was down in the brush.

Q. Is that fence there yet?

A. A portion of it is yet.

Q. The same fence there yet that was the original fence?

A. The same fence that was there then.

Q. Where is it with reference to Poppleton avenue, that fence?

A. That runs on what we call the south side of Poppleton avenue. I could not say just how long.

Q. What kind of a fence is it?

A. It was a plank fence.

Q. Was there ever any wire in it?

A. There was a portion of it.

Q. Was there any house near that fence?

A. A little north of it.

Q. Was not there a house that that fence lapped onto and made a part of the line and the house making a part of the line?

Objected to as improper cross-examination.

A. I think not.

Q. You are sure there was no such fence there?

259 A. I never saw any house that made a part of a fence.

Q. The stable was north of the house?

A. Yes, sir.

Q. How far?

A. I guess it was about 12 or 15 feet, about that; of course I did not measure those things; I guessed at it.

Q. You are sure of that as anything else you have testified to?

A. Yes, sir.

Q. Is the house there yet?

A. No, sir.

Q. Is the stable there yet?

A. No, sir.

Q. Who showed you the place where the house and stable stood when you went up with Mr. Gallagher?

A. I showed myself as near as my mind was.

Q. How do you know whether you got the right place or not?

A. I knew by the piece of ground. After I was cut off this other land I did not pay any more attention to it. I got land of Hanscom; took possession of all his lots in West Omaha to herd cattle on, and in a roundabout way I gets my cattle to run up in that tim-

ber by this wire fence of a Mr. ——; he was an agent; he did not own the land; he was an agent.

Q. Poppleton avenue was not cut out then?

A. No, sir.

Q. Do you know where it was then?

A. Yes, sir.

Q. You knew then where it was, back in 1879?

A. At that time that street had no name as I know *off*.

Q. Was there any other street open?

A. There was no street open in particular; there was a little culvert built.

Q. There was no particular street open?

A. No, sir.

Q. Was not there a road there that run up there over the hill?

A. There was what we call a kind of a by-road.

Q. Where did it lead to—what street did it lead from?

260 A. I could not say that either.

Q. Was not there a public road that was generally traveled that went up over the Hanscom hill and then off in the direction of the poor-house to the corner there?

A. Yes, sir.

Q. How far was this house from that?

A. I guess maybe it was a half, a quarter, and maybe more.

Q. Half a quarter of what?

A. Mile.

Q. North of the road?

A. Yes; it might have been more.

Q. You are as sure of that as anything else that you have testified to?

A. I am pretty sure of that. It could not have been a half a mile; it might have been over half a quarter, I suppose.

Q. Where do you live now?

A. We have just moved; I am pretty nearly lost about that; we live on Burt street between 22nd and 23rd.

Q. What business are you engaged in now?

A. No particular business.

Q. Doing nothing?

A. Not much of anything.

Q. When did you quit herding cattle?

A. Four or five years ago.

Q. What kind of business did you do when you had anything?

A. I have a team that is hauling coal; that is run by my son.

Q. Where did you live at the time that you herded cattle on the land?

A. A part of the time at 13th and Chicago, and on Farnam here a part of the time.

Q. Did you do your own herding?

261 A. I was every day with my herd, pretty much.

Q. Anybody else?

A. Yes; I had my boys there.

Q. Did not the boys do the herding?

A. No, sir.

Q. You did not carry on any other kind of business at that time?

A. No, sir.

Q. You were there all the time?

A. I was there.

Q. How many cattle did you have?

A. From two to three hundred.

Q. One or two boys?

A. Yes; I had one or two boys.

Q. Whose cattle?

A. I could not state all the cattle.

Q. What sort of herding do you mean?

A. Herding town cows.

Q. You took cows from town and kept them on that piece of land?

A. Yes, sir; different parties. I herded for Mr. Woolworth.

Q. Did Mr. Woolworth give you permission to go onto that land?

A. No, sir. I do not know who owned that land. I only got to use it through the agents.

Q. What agents?

A. Mr. Woolworth's, I suppose. I could not call his name. I know his office. I asked him if it would do any hurt if my cattle run over that land.

Q. You asked Mr. Woolworth?

A. No; the agent; and he said, No; it will eat the sprouts off.

Q. And when that was done you knew it was Mr. Woolworth's land?

A. No; he did not say it was.

Q. Do you know that Mr. Woolworth claimed the land?

A. No, sir.

Q. You did not know whose it was?

262 A. No. I knew he was agent.

Q. Who was the agent?

A. I cannot speak his name.

Q. Where was his office?

A. I do not know where his office was; he lived out here, right close to where Bartlett built a big house himself, I believe.

Q. Was the name George W. Ames?

A. That is it.

Q. Just tell us exactly what passed between you and Mr. Ames about that time.

Objected to as incompetent, immaterial, and irrelevant and not proper cross-examination.

Q. There was not anything in particular. I met him one evening, and says I, I understand that you are agent for this land out here that has been cut off. Well, says he, I suppose I am. Says I, Would it be any harm if my cattle run over it? and he says, Go

on; it will keep it clean so we can sell it. That is all that passed between us.

Q. So you went on and used it?

A. Yes, sir.

his
WILLIAM x BATY.
mark.

263 THEADORE GALLAGHER, sworn for the plaintiff, examined in chief by Mr. COVELL, testified as follows:

Q. You may state whether or not you were present at a conference between Allen Root, George M. O'Brien, and Henry A. Akin with respect to the land in controversy in this suit; and, if so, state where it occurred and what arrangements, if any, was made respecting the occupation of the land in controversy by Henry A. Akin.

A. I think it was some time in the spring of 1882. My recollection was that it was in his office, on 15th —, up in the same building where the telephone used to be, in the McCormick building, on 15th and Farnam.

Q. Whose office?

A. George M. O'Brien, Sr.—the old gentleman.

Q. What occurred there in reference to this land in controversy?

A. The conversation between Mr. Root and Mr. O'Brien and Mr. Akin as to the question of occupying that land and the house in behalf of Mr. Root; I could not relate it word for word.

Q. State what that conversation or arrangement was.

A. I could not relate the words.

Q. State the substance of it.

A. The substance was that he was to represent Mr. Root. Mr. Root and him were there and Mr. Root done his own talking.

Q. In what was he to represent Mr. Root in this land?

A. He was to occupy that place for Mr. Root. There was some contract between them to rent it. I do not know the particular points.

Q. How long was he to occupy the land for Mr. Root as his tenant?

A. I do not know that I can state that, but I would judge from year to year. I do not know that I could state that there was any specified time.

Q. After that, did or did he not occupy the land in controversy for Mr. Root?

264 A. He occupied it, sir,

Q. How long?

A. I do not know just how long he was there. I could not say. Something over a year, though, but how long I could not say.

Q. Do you know a man by the name of Murphy, who testified in this case as a witness for the plaintiff?

A. I do not know Mr. Murphy. He came to my house some time last June—a man and his wife—I think somewhere near the 11th of June—one night about half past six o'clock. I was doing up the chores. That was the first time I ever saw him, and the lady said

his name was Murphy, and she said her name was Mrs. Murphy; that was the first time I ever saw her in my life.

Q. State whether or not prior to that time you had ever met Mr. Murphy or Mrs. Murphy.

A. I never had, to my knowledge.

Q. You may state whether or not you had ever had any conversation with Mrs. Murphy as to the finding of some horses or cattle upon the land that is in controversy in this action.

A. I never looked for a horse or cow in my life and never have lost a horse or cow.

Q. Do you know a man by the name of Pinio, who is now present in this room?

A. I do, by sight, but am not acquainted with him.

Q. Where did you first see this man?

A. I saw him about the *the* strike of the B. & M. the first time I think that was a year ago last April; perhaps somewhere in that neighborhood. The next time I saw him was on the railroad. The next time he came to my house one Sunday.

Q. Who came with him?

A. A man named McMahon, I believe.

Q. What occurred between you at that time that McMahon came to your house?

265 Objected to as immaterial and irrelevant.

A. McMahon, the leading fellow in the fight he wanted to know what I knew about it, anyway—what I knew about the land. He wanted to know if I could get a quitclaim from Mr. Root for a portion of this land in controversy. He said he would pay me well for it if I could do it. That is about the substance of the conversation.

Q. State everything that occurred there, relating to this piece of land, at that time?

A. All he wanted was to get in there and get possession of a piece of land, and I told him the best thing he could do was to see Mr. Root. I had nothing to do with it, one way or the other. He said if a stranger went to him he would shove the price up on him, and he wanted to know if I would see him and ask him if he would quitclaim two acres that they wanted in that corner. My advice was for him to see both parties, Mr. Woolworth and Mr. Root, and all he cared for was possession, or seemed to be.

Q. What business is Mr. Pineo and McMahon following?

A. I do not know, only what I hear.

Q. What business are they reputed to be in?

A. B. & M. detectives.

Q. In whose employ did they represent themselves to be, if anybody's, at the time that they came to your house?

A. I do not think they represented themselves to be in anybody's employ in particular. I do not think they did.

Q. For whom did they say, if at all, that they wanted this quitclaim deed?

A. It appeared to be for themselves.

Q. What, if anything, did they say to you respecting the object they had in view for obtaining this quitclaim deed, if anything?

A. It seemed to be possession was all; they thought they would have the better end of the fight if they had possession of it.

266 Q. You may state whether or not you were present at any other time when a conversation was had or made between the Mr. Root and Mr. O'Brien and Henry Akin than that which you have stated heretofore, as to this particular piece of land in controversy and the occupation of it by Mr. Akin for Mr. Root.

A. I do not think I can call to memory any other time, except perhaps about the time that Mr. Akin went to close out his affairs, and I do not know whether Mr. Root was present or not; perhaps he was. I went off; I left and went East, and the affairs were would up—I think it was some time in March, 1883. I was not present at the last winding up. Mr. Akin sold the fence posts to Mrs. Galligher and she paid him for them—at least, that was my understanding—on the piece of land that I now occupy. I think that my understanding was; I did not see it. I know that Mrs. Galligher paid for the other. Mr. O'Brien or Mr. Root paid them. I do not know; I did not see it. I know this other transaction.

Q. State whether or not anybody has approached you lately respecting testimony to be given in this cause; and, if so, whose was it, and on whose behalf did that occur, if it occurred at all?

A. On yesterday afternoon, on the 31st day of October, 1889, a man by the name of John —— approached me in either Frederick's hat store or the other, I would not say which, and wanted to know if I had any interest in this land. I told him I had not, one way or the other.

Q. What proposition, if any, was made by him to you, and on whose behalf or how was he making it?

A. He represented the other side, Mr. Woolworth's side, of the question. I could not relate the conversation particularly. He wanted to know if I had any interest in it, and I told him I had not, one way or the other.

Q. What else occurred there at that time, if anything?

267 A. I asked him who sent him to me, and he said some man that represented Mr. Woolworth, I believe.

Q. Were any propositions made to you by him for giving your testimony on behalf of that side?

A. No; no propositions. He said that he supposed I knew something that I had not said or something of that kind; that I knew something that I had not stated, or something.

Q. Have you stated all the conversation as it took place between you?

A. About as near as I can remember.

The cross-examination of this witness is waived.

THEO. GALLIGHER.

ALLEN ROOT, the respondent, recalled in his own behalf, examined in chief by Mr. COVELL, testified as follows, having previously been sworn:

State if you know a man named Frank Murphy, who testified formerly in this case as a witness for the complainant.

A. Yes; I know a man by that name.

Q. Did he or not live upon the land in controversy in this action; and, if so, whereabouts on the land did he live, if you know?

A. He lived on the land, with other graders, about 1886 and 1887; some time in those years. I did not know Mr. Murphy's name at that time. I now know it, and the shanty that Murphy lived in was about midway between the north and south line of the land and about 30 rods—20 or 30 rods—from the east line.

Q. How long did he live there?

A. I cannot tell exactly. He lived there during these two years; just how long I do not know.

Q. What kind of a house or cabin did he occupy?

A. He occupied a house that was made of pine boards, and I think it was covered with tar paper and boards battened. That is as near as I recollect.

268 Q. *Oppose* whose house, fronting on 33rd street, was it that he lived while there?

A. I cannot call the man's name who lives there now.

Q. Is it the house directly south of Dicks?

A. Yes, sir.

Q. Is it opposite of Mr. Siberts?

A. I think that is the name. I think that is the name—right opposite of that, down the hill.

Q. Did he have any barn or stable or shanty on the premises?

A. He had a stable, or I suppose it is where he kept his horse.

Q. You may state whether or not he lived in the southeast corner, or anywheres near the southeast corner, of the premises in controversy at that time.

A. He did not live anywhere except in this house, about the middle of the premises north and south.

Q. From 1885 to the time that he went off these premises, was there or was there not any other house anywheres near the southeast corner of the premises?

A. Yes, sir.

Q. In what direction did that house stand from the house occupied by Mr. Murphy?

A. The house near the south line of this land was a little east of south.

Q. From the house occupied by Mr. Murphy?

A. Yes, sir.

Q. Who occupied that house?

A. A man named Upton.

Q. What kind of a house was that?

A. It was a shanty like a railroad car, as to the roof. I think the boards were up and down and the roof was painted over. That was the house.

Q. Did you hear the testimony given by Mr. Knight in this cause previously?

A. I did.

269 Q. State whether or not the house occupied by Mr. Upton was at or about the point located by Mr. Knight in his testimony.

A. Very near.

Q. How far from that house was the house that was occupied by Mr. Murphy?

A. About 30 or 40 rods—maybe more than that—and a little down the hill.

Q. What do you mean by down the hill?

A. There is a side hill all the way on that side from the east side of this land. There is a side hill that comes down until you reach the bottom of the actual slope to the west.

Q. What do you mean by the bottom of the ditch or actual bottom of the ravine—where it didn't get any lower?

A. Yes, sir.

Q. What direction from the house occupied by Mr. Murphy was this ravine?

A. West.

Q. Did you ever give Mr. Murphy permission to live there—to make any contract with him to live there on these premises?

A. No. He, with other graders—there were five shanties or places where they stopped at the time on this land, in 1887, in the fall. There was five or six places where they stopped and fed their horses. They went there and put up their tents.

Q. Were they grading near there?

A. They were grading in 1887.

Q. Where?

A. They were grading Poppleton avenue—taking it out of Poppleton avenue up as far as 32nd street and putting it into hole on Poppleton avenue.

Q. Did you hear the testimony of Mr. Akin as given in this case?

A. I did.

270 Q. You may state if you saw him occupying the house which he occupied upon the premises in controversy during the time that he lived there.

A. Yes; I saw him in the house.

Q. You may state whether or not the house that he occupied stood in a fence which he described as running across the land from the poor farm east south of Poppleton avenue.

Objected to, the witness having testified in his former examination upon this matter covering the whole matter.

A. I have no distinct recollection as to the fence, but as to the house I have a distinct recollection, and it stood there in what is now graded off as Poppleton avenue, or north.

Q. Was there or was there not a fence running up to the northwest corner of the house, as stated by him in his testimony?

A. I have no distinct recollection of the fence touching the house

either way. There was a fence running along there, but whether it touched the house that Mr. Akin lived in I cannot say.

Q. Have you any recollection as to whether the house or one side of the house formed a part of the fence which formerly stood south of Poppleton avenue or not?

A. My recollection is that the fence did not touch the house?

Q. In what direction was the fence from the house occupied by Mr. Akin?

A. The fence for the most part was south of it—bent in to get to the house, and then out again on each side of it. The fence run along the cleared land and the house was in the brush or timber.

Q. How came Mr. Akin to be occupying that house upon that land?

A. He went there by an arrangement made with O'Brien under my instructions. O'Brien located him on the land by previous agreement.

Q. Was he or not occupying the land as your tenant?

271 A. He was occupying the land for me—that is, the house; understand, the land he occupied was not a part of this land. The land he occupied belonged to another tract that he plowed and cultivated, but the house land was what he occupied for me—that is, the land that he cultivated was not a part of the tract in controversy. That is what I stated.

Objected to counsel consulting with the witness while on the stand.

Mr. COVELL: I only wished to ask him if there was any other matter to inquire about which occurred to the witness.

Q. Is there is any other matter which you have not stated concerning this controversy between you and Mr. Woolworth, concerning which I have not asked you directly relating to this matter, you may now state it.

A. I will state a little circumstance in relation to this. In 1881 Richard Colgen came and wanted to rent this piece of land to live on, and told him I would rent him the land.

Objected to as immaterial and irrelevant and incompetent and hearsay.

A. But he wanted me to build him a house. I refused to build the house. In 1882 he, through some means, Akin, and I got together and the arrangement was made that Mr. Akin should carry out whateve- contract was made with Mr. Colgen. This took place in 1882, some time in the spring.

Q. What do you mean to be understood by the contract or arrangement or offer which was made to Colgen and which you say Mr. Akin was to carry out?

A. Mr. Colgen was to live there and take care of the land and timber. The offer made by Colgen was carried out by Mr. Akin. He built the house which I refused to build was the only difference.

Q. If there is any other matter which you have not stated relat-

ing to this controversy between Mr. Woolworth and you concerning which no question has been asked you may state it now.

272 A. I do not think of any.

Cross-examined by Mr. AKIN:

Q. I understand you to say that Mr. Akin built his own house?

A. Yes, sir.

Q. When did he build it so far as you know?

A. So far as I know he built it.

Q. When did he build it?

A. Some time in 1882; I said he built it. I did not see it.

Q. That is not the house that Mr. Pierce lived in, is it?

A. I think not. It was a smaller house that Mr. Pierce lived in.

Q. I understand you to say that there was a fence running east and west. Am I right in that?

A. The east of it was east and west, and I think I stated it run along the edge of the brush and clearing?

Q. Easterly and westerly?

A. Yes, sir.

Q. It separated this land from the O'Brien land—this fence?

A. I cannot say whether it was on the line or not.

Q. I did not speak with reference to the dividing line between the fence; just where the line was *that* the fence was to separate the two tracts, was not it?

A. I think the fence was built to separate the plowed land from the brush land, which was herded upon more or less.

Q. The plowed land was south of the fence, was not it?

A. Yes, sir; it was cultivated by Mr. Akin; broken up by Mr. Akin.

Q. How much was it that he cultivated?

A. I do not know.

Q. Whom did he hold under there?

A. I do not know.

Q. Don't you know that O'Brien was claiming that land?

273 A. I know that O'Brien claimed it, but what arrangements he had with Akin I do not know.

Q. Did Mr. Akin ever cultivate any part of this land that is in dispute?

A. I think not, unless it might have been where the prairie and timber joined on the northwest corner before the street was graded; there may be the place there where the fence run into this piece of land.

Q. The northwest corner?

A. Southwest corner; that is what I said or should have said.

Q. If he did cultivate that, it was south of the fence, was it?

A. Yes; what he cultivated was south of it.

Q. All south of the fence?

A. Yes, sir.

Q. You think the fence run up to the house and bent in?

A. I cannot say as to that. The house was in the timber and the

fence separated the timber from the prairie. If the fence touched the house at all it bent in to get to the house. I cannot say whether the fence touched the house or not.

With this the testimony closed on the part of the respondent.

Certificate.

UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

I, Chas. A. Potter, examiner in chancery, duly appointed by the circuit court of the United States for the district of Nebraska, in the eighth circuit, do hereby certify that the — day of ——, named in the depositions hereto annexed, I was attended at my office named in this annexed notice in the city of Omaha by the counsel and witnesses aforesaid; that the said witnesses were duly sworn
274 and examined, and the depositions were reduced to writing and read to the witnesses and by them subscribed in my presence.

I further certify that exhibits —.

Dated Nov. 9, 1889.

C. A. POTTER,
Examiner in Chancery.

Fees.

Depositions: 225 folios, 20 cents per folio		$45 00
Swearing 5 witnesses, 10 cents		50
To copy for pl'ff and copy for def't, 225 folios each		45 00
To be paid by plaintiff for 225 folios, at 10c., 22.50 x 45.50	68 00	
defendant for 225 folios, at 10c., 22.50	22 50	
		$90 50

Upon the back of said depositions appear endorsements in words and figures following, to wit: No. 212, M. Rec'd Nov. 13, '89, and opened by order of court Nov. 14, '89. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, on the 14th day of November, 1889, depositions on behalf of complainant were filed in said case; which said depositions are in words and figures following, to wit:

In the United States Circuit Court, District of Nebraska.

JAMES M. WOOLWORTH }
vs.
ALLEN ROOT. }

GENTLEMEN: Take notice that, in pursuance of an order, a copy of which is hereto annexed, the examination of witnesses on the part of the plaintiff will take place at the office of the clerk of the United States district court for the district of Nebraska, in the United States

post office and court-house in Omaha, on the (12th day) of July, 1889, at 10 o'clock a. m., and proceed as the master making said order shall direct, adjourning from day to day, if necessary.

J. M. WOOLWORTH,
Pl'ff in Person.

To Webster and Covell, counsel for defendant.

275 Ordered that the testimony of witnesses for the plaintiff in the foregoing cause mentioned be taken before me at the place stated in the above notice on the (12th) of July, 1889, at 10 o'clock a. m., and that the solicitors for the defendant be notified of the said examination by service on the day of the date hereof of said notice.

Dated July 10th, 1889.

E. S. DUNDY, JR.,
Master in Chancery.

Endorsed: United States circuit court, district of Nebraska. James M. Woolworth *vs.* Allen Root. Notice. J. M. Woolworth, att'y for pl'ff. Service of within notice admitted this 10th day of July, 1889. G. W. Covell, att'y for Root.

In the Circuit Court of the United States for the District of Nebraska.

JAMES M. WOOLWORTH, Complainant,
vs.
ALLEN ROOT, Defendant. } 212, M. In *in* Chancery.

Testimony taken before E. S. Dundy, Jr., examiner in chancery of said court, the 12th day of July, A. D. 1889, pursuant to annexed notice and order.

Present: James M. Woolworth and A. J. Poppleton, solicitors for complainant, and G. W. Covell, solicitor for defendant.

FRANK MURPHY, ELIZABETH MURPHY, FRANK MURPHY, AUGUST DOLL, GRAHAM P. BROWNE, JAMES M. WOOLWORTH, WILL. BROWN, JR., and others, witnesses on behalf of the complainant, being first duly cautioned and sworn, *was* examined in chief by Mr. WOOLWORTH, — deposes and says as follows:

276 FRANK MURPHY, a witness of lawful age, being first duly examined, cautioned, and solemnly sworn, deposeth and sayeth as follows:

Examined by Mr. WOOLWORTH:

Q. What is your name, age, occupation, and place of business?

A. Well, my name is Frank Murphy; my age would be 50 past, and I live on 27th street, between Hickory and Center streets; I am a teamster.

Q. Are you acquainted wlth the premises in question in this case,

now known as Oakhurst, and being a part of section 28, township 15, range 13?

A. Yes, sir; that is where I lived over there. I used to live on that place.

Q. When did you go to live on that place?

A. I built the first house on there in November t-o years ago—two years this November.

Q. How long did you live there?

A. I lived there until—I think it was in April I moved away from there—of the second year. I lived there between 17 and 18 months, as near as I can guess. I cannot give the dates.

Q. Did you have any permission to live on that place?

A. Yes, sir; I had.

Q. Whose permission did you have?

A. James M. Woolworth's.

Q. State how you come to get his permission to live there.

A. Well, sir, I built a shanty in the street there and they were going to grade Poppleton avenue, and I had to move my house off the street, and this property was straight back of the house north of me, and a part of the house was on the property at that
277 time, and the stable was partly on the street and partly on this property. There was a ditch there dug in the street, and there was not *wuire* room enough on the street, and I built partly on the street and partly on this property, and, if I remember right, Mr. George Hicks told me that Mr. Woolworth owned this property.

Defendant objects to the witness stating what Mr. Hicks said to him or what anybody else said to him as hearsay and incompetent.

A. I wanted to find out who owned the property and I went down to Mr. Woolworth and told him the circumstances and told him I would like to move my house back on that place. He told me "he would be liable to sell at any time," but if you want to put your house on it you can build it there, but you will have to move off if I sell, "and I will try and find some other place for you," and I told him I was willing to move off whenever he gave me orders to do so.

Q. Was there any other improvements on the property besides yours?

A. No, sir; there was no one else living there except some campers that came on there and staid while Poppleton avenue was being graded.

Q. How long did they stay there?

A. Some of them staid till the grading was done and some did not stay so long. Some of them had some tents up there. Mr. Riley put up four upon the ground to keep his horses in.

Q. Was there any other improvements on the place besides yours?

A. Not that I know of, and I have been all over it at that time.

Q. When did you first see that place?

278 A. I never knew it till I built that shanty there and I built it in the street and then I found out the place was Mr. Woolworth's.

Cross-examination.

By Mr. COVELL:

Q. Where did you say you lived in 1886?

A. That would be in 1886 I put up that house. It will be two years this November. No, it will be three years this November I put up that house there in the street and the next spring I moved it back onto that property.

Q. Where was the house situated?

A. It was situated on the street; a part of it was on the street and a part of it ran over onto that property.

Q. On what street?

A. Poppleton avenue.

Q. How do you know it was Poppleton avenue?

A. How would anybody know it was Poppleton avenue? The people called it that.

Q. Was the street open at that time?

A. Poppleton avenue was open.

Q. You say you built the house on Poppleton avenue. Was it in use at that time and travelled?

A. Poppleton avenue was open at that time, but it was not graded when I built my house.

Q. When was it opened?

A. I do not know.

Q. When was it graded?

A. It was graded two years ago this summer.

279 Q. Then it was graded in 1887?

A. Two years ago; that would make it in 1887.

Q. Whereabouts on that property was this house situated that you erected?

A. I could not tell you exactly. I could show you if you was there.

Q. Do you know a man named Pinneo?

A. No, sir; I do not. I do not recollect of him. I do not know him.

Q. Do you know a detective named Pinneo?

A. No, sir.

Q. Do you know a detective in this city by the name of McMahon?

A. No, sir.

Q. Have either of these parties approached you to ascertain what evidence you would give?

A. I do not know of any detective approaching me.

Q. Has anybody approached you before you were here to testify to-day as to what you would testify to in this case?

A. A man came to me and told me he wanted me to come here and give my evidence in this case to-day.

Q. Who was he?

A. I do not know what his name was. I never heard his name?

Q. Was it Mr. Woolworth?

A. Mr. Woolworth told me once he wanted me to give my evidence in this case.

Q. When was that?

A. I don't recollect just how long ago it was.

Q. About how long ago was it?

A. It was a week or ten days ago. I am not sure as to that.

280 Q. Who else approached you?

A. Another man asked me to come. He said Mr. Woolworth wanted me to come.

Q. Do you know who the man was?

A. I do not remember his name. I heard his name, but do not remember it.

Q. What did the man say as to what testimony you were to give in this case?

A. He did not know what testimony I was to give.

Q. What did he say to you, and what did you say to him?

A. I just told him what passed between me and Mr. Woolworth, for that was all I could tell.

Q. But Mr. Woolworth knew that, did he not?

A. I expect he did; at least he ought to.

Q. And when you built the house you say it was in the street on Poppleton avenue?

A. Yes, sir.

Q. Did any one give you permission to build in the street?

A. No, sir.

Q. Did you pay any rent to anybody while you occupied the house?

A. No, sir.

Q. Did you have any lease from any person while you occupied the house?

A. No, sir; I had no lease save his word. The house was mine. It did not belong to Mr. Woolworth.

Q. How long did you occupy the house?

A. I think between 17 and 18 months, to the best of my opinion.

Q. How long did it stand on the property in controversy?

A. When I sold the house the man moved it right away. I guess it may have stood 3 or 4 weeks before he moved it off.

Q. How long after you moved it on the property in controversy was it you occupied it?

A. I occupied it between 17 and 18 months.

281 Q. How long after you built the house was it when you moved it on the property in controversy?

A. I moved it over the next June. I built the house in November, and a part of it stood on this property originally and a part stood in the street.

Q. Whereabouts was this house that you speak of?

A. I think it was about 100 yards from Poppleton avenue and about the same distance from the other street west of the street east of it—the one that run right west of 32nd street.

Q. What, if anything, has been promised you by any one for giving your testimony in this case?

A. Nothing has been promised me.

Q. You knew nothing about this property prior to the time you built your house there?

A. No, sir; I did not know such a property exiseted.

Q. Who lives near that property?

A. Mr. Dickson lives there.

Q. Where does Mr. Dickson live?

A. He lives on that street that runs east of this property. He lives in the next house to Poppleton avenue, on the next lot to the corner.

Q. Who else lives there?

A. Mr. McNiley lives there. He lives further south than Mr. Dickson.

Q. Who lives on the street on the north side and on the east side of this property? Who did at the time you was living there?

A. I don't know the men's names that lives there. I used to get water from his hydrant, too. I could not tell you his
282 name.

Q. Was there a hydrant located anywhere near this property at the time you mention?

A. I know I got water from there. It was put in there the same summer, or else the winter before it was graded.

(Excused.)

283 ELIZABETH MURPHY, a witness of lawful age, being by me first duly examined, cautioned, and solemnly sworn, deposes and says as follows:

Examined by Mr. WOOLWORTH:

Q. What connection are you with the gentleman who has just been testifying?

A. I am his wife.

Q. Did you live with him in 1886 and 1887?

A. Why, I suppose I did.

Q. Where did you live?

A. Why, we lived down, I think, on Poppleton avenue and Thirty-third street.

Q. When did you go there to live?

A. I went there myself two years ago this December—last December. Mr. Murphy was there before that building the house.

Q. How long had the house been there before you went there?

A. It was hardly finished when I got there. I could not say how long. It was hardly fit to go in when I got there.

Q. Was the house moved back from the street while you lived there?

A. Yes, sir; the next summer it was moved back.

Q. How long did you live there?

A. We went there in December, and we lived there until about the 15th of April—a year from the 15th of the next April or about that time.

Q. Do you remember the occurrence of anybody coming there in search of a horse?

A. Yes, sir.

284 Q. When was that?

A. That was in the spring, I should say; I could not say just what time, but it was in the spring after we went there to live.

Q. What did he say?

Objected to as incompetent, irrelevant, and immaterial.

A. Why, he asked if I had seen anything of a horse running around there loose, and finally he got to talking about our shanty, and if we was not living in the street, and I told him we expected to move it back on the land and that my husband wanted to see a man named Woolworth, who he was told owned the land, and see if we could not move it b-ck on the land, and he told me to go ahead and move it back on the land. He says, "Woolworth has no better right to this land than I have, and he will not bother you."

Q. What was it?

A. Well, sir, I did not ask him his name.

Q. Describe him.

A. He was a smallish like man and had a good bit of beard on his face, and I think he was about 45 years of age; he was a kind of a shabby looking man—a kind of a slouchy looking man.

Q. Have you ever seen him since?

A. I thought I saw him last night.

Q. Is his name Theodore Gallagher?

A. That is what he called himself; he said his name was Gallagher.

(Excused.)

ELIZABETH MURPHY.

285 JOEL A. GRIFFIN, a witness of lawful age, being first duly examined, cautioned, and solemnly sworn, deposeth and sayeth as follows:

Examined by Mr. WOOLWORTH:

Q. Are you the gentleman who testified in this case before?

A. Yes, sir.

Q. Who asked you to come and give that testimony?

A. Well, there was a subpœna served on me or given to me.

Q. When you testified before were you subpœnaed to testify.

A. I had a subpœna; yes, sir.

Q. I mean when you testified before. Did you have any talk with anybody before that about what you would testify to?

A. I do not know whether I had or not, or whether Mr. Gallagher said he wanted me as a witness or not; I do not know.

Q. But you had a talk with Mr. Gallagher before you came to testify?

A. No; not on that case. I did not know anything about it till I was served with a subpœna.

Q. Had you had a talk with Mr. Gallagher about giving your testimony in the lawsuit just before that?

A. No, sir; I think not. I did not know till the morning I went up to testify what the suit was.

Q. Mr. Gallagher did not tell you he wanted you to come there to testify, did he?

A. I think not; I think the first I knew of that suit was the time that the subpœna was served on me.

Q. And you did not tell him anything about what you were going to testify to, did you?

A. Well, sir, I do not know whether I did or not.

Q. Did he not tell you he wanted you to testify in a law-
286 suit when you talked with him?

A. I do not know that I knew anything about it before the subpœna was served on me.

Q. Did he afterwards?

A. Perhaps he did.

Q. You do not mean to say you went there and testified without telling anybody what you was going to swear to, do you?

A. Yes, sir.

Q. You went there to testify without anybody telling you what they wanted you to swear to or what the suit was about, did you?

A. I knew what the suit was about after I got the subpœna.

Q. Who told you?

A. I presume Gallagher did.

Q. Did you have any talk with Root about it?

A. He *do* not know as to what I was going to testify to. Root and I was not very good friends and had not shaken hands for several years, but I met him on the street that morning.

Q. Did you talk with him about the case?

A. I do not remember, only in a general way.

Q. Then you did talk with him in a general way. Did he tell you any more about it than Gallagher had?

A. No, sir; I do not know that he did. I do not remember the conversation.

Q. What did Gallagher say to you after the subpœna was served on you, when he and you talked about this case?

A. I cannot remember the conversation.

Q. Don't you know that Theodore Gallagher went around and got
287 the witnesses for the defendant in this case and got them together to testify?

A. I never knew it.

Q. Who first spoke to you about the case?

A. I do not remember.

Q. Was it Gallagher that first talked to you about the case?

A. I cannot say who it was. I do not remember whether it was Root spoke to me first or whether it was Gallagher.

(Excused.)

288 AUGUST DOLL, a witness of lawful age, being by me first duly examined, cautioned, and solemnly sworn, deposeth and sayeth as follows:

Examined by Mr. WOOLWORTH:

Q. What is your name, age, occupation, and place of residence?
A. My residence is on Leavenworth street and 35th street, in this city; my name is August Doll, and I am 59 years of age, and I have no occupation.
Q. How long have you lived in Omaha?
A. Since 1856.
Q. Are you acquainted with the premises in question?
A. Yes, sir.
Q. How long have you known them?
A. I have known them since 1876.
Q. Where did you live before going to live in your present house?
A. I lived on what is now called Mayne place.
Q. Who owned that land while you lived there?
A. I owned it.
Q. Did you sell it to Mayne?
A. Yes, sir.
Q. When?
A. About three years ago.
Q. How long did you live on that place?
A. I think about 11 years.
Q. How near these premises in question was that property of yours?
A. It joined mine right on the south.
Q. How much land was there in that property you sold to Mr. Mayne?
A. Twenty acres.
289 Q. From the time you owned it, in 1876, for eleven years and over, state how frequently you were on the premises in question.
A. I generally was there once a week.
Q. How much did you go over the land—this tract of 17 acres?
A. I went all over the land. I generally went there of a Sunday morning and I went all over the place.
Q. State whether you ever knew a man by the name of M. R. Pi-rce or J. N. Pierce or Cyrus R. Pierce living in that vicinity.
A. I knew a Pierce, but he was living on the poor farm.
Q. What was his name?
A. I do not know as I could give the name.
Q. State whether or not he ever lived on the premises in question, to your knowledge, or about them.
A. He did not.
Q. State whether or not anybody ever lived on these premises from — 1, 1876, for the 11 years following, to your knowledge.
A. Yes, sir; I think some of the time there was somebody lived there.

Q. Where did they live?

A. They lived right close to the south edge, where the road is, and about the middle of the block. There was a little shanty there.

Q. Describe that shanty.

A. It was a shanty of boards put up and down and had a small window in it.

Q. How large was it?

A. I should say it was about 16 by 20.

Q. Did you ever go in the house?

A. No, sir; I never went in it.

Q. Did you ever know of more than one person living in that house?

A. No, sir; I did not.

290 Q. When did these people live there that you speak of?

A. I could not tell you that exactly.

Q. Tell us as near as you are able.

A. I think they were there when I came there. I think they must have lived there from 1876 to 1878.

Q. Did the house remain there in 1878?

A. I do not know exactly. I know the house was taken away afterwards.

Q. Could you tell about when the house disappeared?

A. No, sir.

Q. Can you tell within two or three years?

A. I think the house was not there in 1880 any more.

Q. Did you ever do any work on these premises?

A. Yes, sir; after it was laid out in lots I cut out the streets and alleys there.

Q. Well, you say you cut out the streets and alleys. What did you do in the way of cutting them out?

A. Well, I cut the timber out and cut the brush down.

Q. What did you do upon the lots besides the streets and alleys in the way of cutting timber?

A. We cut the timber afterwards on the lots—kind of thinned it out—and afterwards we made a clean sweep.

Q. When did you cut the timber off the streets and alleys?

A. I think it was in 1883 and 1884.

Q. When did you cut the rest of the timber out?

A. I think it was in 1884.

Q. How much timber did you cut out?

A. Well, I cut out a good deal.

Q. How much did you leave standing?

291 A. Well, I think in the first place we left about 8 or 10 trees on the lot, and afterwards we cut out still more.

Q. What became of the wood that you cut there?

A. I got the wood for chopping it out.

Q. Who did you do this for?

A. I was ordered to do it by Mr. Ames.

Q. Who is he?

A. A real-estate agent.

Q. When you were doing this work did you see Allen Root, the defendant, on the premises?
A. No, sir; I saw nobody there; no shanty or anything.
Q. How long before this had this shanty disappeared?
A. I could not tell you, but I think it was a good while.
Q. Did you have any conversation with Allen Root?
A. Me; never.
Q. Did Allen Root come onto the premises while you was cutting timber there?
A. Never. I never saw him there.
Q. How long was you engaged in cutting timber there?
A. It was two summers.
Q. The summers of what two years?
A. The summers of 1883 and 1884.
Q. For how long a time did you work there in 1883?
A. The whole summer.
Q. And how long in 1884?
A. It was not so long in 1884.
Q. Can you tell how many cords of wood you cut out there in both of the summers?
A. Yes, sir; I think I cut out more than 100 cords.
292 Q. What are your means of support, you say you do not do any business?
A. I live on my interest.

Cross-examination.

By G. W. COVELL, Esqr.:

Q. Do you know where the house is situated that Mr. Root lives in now on these premises?
A. Yes, sir; I do.
Q. About how far from that house was the shanty you speak of situated in which you say the man lived from 1876 to 1878?
A. That house was east about, I might say, 150 yards or something over that.
Q. Was it down towards Poppleton avenue?
A. Yes, sir.
Q. You say you cut wood on the premises in 1883 and 1884?
A. Yes, sir.
Q. When you were cutting wood on the premises state if you were not told by some person that the wood would have to be paid for if you cut it.
A. No, sir.
Q. No person saw you and told you if you cut the wood you would have to pay for it?
A. No, sir.
Q. Not at any time while it was being cut?
A. No, sir.
Q. Did you cut the wood yourself?
A. I had the men there.
Q. Were you there all the time?

A. Yes, sir; most of the time.

293 Q. During the time they were cutting the wood you were there, were you?

A. I was there when they were cutting the wood.

Q. You did not do any of the cutting yourself, did you?

A. Some of the time I cut wood myself to show some one that did not seem to know how.

Q. But you did very little of it?

A. If I had a poor chopper there I showed him how to chop.

Q. But you did not work there regularly yourself?

A. No; I looked out for it.

Q. And you do not know but that some of these parties that were chopping wood there were warned that they would be required to pay for the wood they cut?

A. If they were they would have spoken about it to me.

Q. But you do not know personally that they were not?

A. No, sir.

Redirect examination.

By Mr. WOOLWORTH:

Q. Do you know Allen Root?

A. I have known Root since 1856, I believe.

Q. Did you ever see him passing by or on this land?

A. No, sir; I did not.

(Excused.)

AUGUST DOLL.

294 GRAHAM P. BROWN, a witness of lawful age, being by me first duly examined, cautioned, and solemnly sworn, deposeth and sayeth as follows:

Examined by Mr. WOOLWORTH:

Q. State your name, age, occupation, and place of residence.

A. My name is Graham P. Brown. I am in the stock business, and am 28 years old, and I live at 37th and Leavenworth streets, in this city.

Q. How long have you lived there?

A. At 37th and Leavenworth streets—I have lived there since the 17th day of April, 1879.

Q. How near the premises in question?

A. The premises I suppose you refer to is Oakhurst. It is one block east and three blocks south to the west line of it.

Q. State whether or not you were from 1879 on for several years frequently on the premises known as Oakhurst.

A. Yes, sir; I was on there a great deal, and was back and forth through the timber.

Q. How frequently in 1879?

A. I was continually running over there in 1879 and 1880 after the cows. I turned them out, and they run over there to these woods, and I would go to hunt them up.

Q. State whether or not you ever knew a man named Pierce living on these premises or in that vicinity.

A. Yes, sir; I knew a man named I. N. Pi-rce who lived on the poor farm, but not on these premises.

Q. Where is the poor farm with reference to these premises?

A. It is about a block and a half directly south.

Q. Do you know of any other man by the name of Pierce
295 who lived in that vicinity?

A. No, sir.

Q. State whether or not you knew any person or any family to live on these premises while you knew them.

A. Up to what time?

Q. From 1879 to the present time.

A. Well, I never knew any one to live on the premises, but I know the last year there was a shanty or two there, and I believe there has been a house there probably a year, but as to the party that lived in them, I don't know them.

Q. State whether or not there was a house on these premises in 1879.

A. No, sir; there was not a sign of a house that I came over there.

Q. Was there from that time for the two years following, from 1879 and 1880 to 1881?

A. No, sir; there was not a house on that place from April 17th, 1879, until probably 1887.

Q. I want to call your attention particularly to one place on those premises, and that is the first ridge as you come east from the poor farm. State whether or not on the west slope of that ridge and towards the south—towards what is now Poppleton avenue—there was any house in 1879, 1880, or 1881.

A. No, sir.

Q. Did you pass by that particular part of the premises during that time?

A. Yes, sir.

Cross-examination.

296 By Mr. G. W. COVELL:

Q. What is your business?

A. I am in the stock business.

Q. What kind of stock do you deal in?

A. I deal in all kinds of stock.

Q. But your business is mainly dealing in chickens, is it not?

A. No, sir.

Q. And has been for years?

A. No, sir.

Q. You keep a chicken yard on the corner of 37th and Leavenworth, do you not?

A. No, sir; on 36th and Leavenworth.

Q. Who has been talking to you prior to your coming here about your giving testimony in this case?

A. There was a party addressed me and asked me if I would be kind enough to come down to this court and tell what I knew about this property.

Q. Is this man Pinneo the man?

A. No, sir.

Q. Do you know a detective by the name of McMahon?

A. No, sir.

Q. Who was the man that came to you and asked you that?

A. I do not know his name.

Q. Was it Mr. Woolworth?

A. No, sir; he is not the gentleman that came to me.

Q. You do not know the man that came to you?

A. No, sir; I do not know him by name.

Q. Did you tell him what you would testify to?

A. No, sir; I did not specify anything I would testify to.

297 Q. When was it he came to see you about it?

A. He came to see me some two or three weeks ago, I think.

Q. Were you subpœnaed in this case to come and give your testimony in this case to-day?

A. I suppose you mean a written order.

Q. Did any officer serve any subpœna upon you to give your testimony in this case?

A. No, sir; not that I know of.

Q. Then you came voluntarily?

A. Yes, sir.

Q. Now, when was it you state you saw these premises first that are in controversy in this case?

Q. When I first saw them?

A. Yes, sir.

Q. Why, I have known the premises since—I have known of the premises and have been on them since 1879.

Q. You went to live where you now live on April 17th, 1879?

A. Yes, sir.

Q. And on your direct examination you stated you knew the premises since April 17th, 1879?

A. Yes, sir—that is, I have been on them more or less since that time.

Q. How often were you on them from that time on?

A. I have been on those premises a great deal.

Q. Well, how often?

A. Well, for instance, whenever I would be driving stock back and forth. I used — turn my horses and cows out and they would roam over that ground, and I would go and hunt them.

298 Q. Did you know these premises in 1876, 1877, and 1878?

A. I knew them in this way in those early days: I lived down-town and we occasionally went out hunting, Will Simeral and two or three others, and up to April 17th, 1879, I was in through these woods hunting.

Q. Is it not a fact that from 1876 to 1879 there was a house stand-

ing upon this ridge that has been called to your attention by Mr. Woolworth, and it was occupied by a family?

A. Never; I don't recollect of seeing any of that.

Q. How often were you on that ridge or near that ridge during the years 1876, 1877, 1878, and 1879?

A. I was in that vicinity, but I could not tell as to the ridge, but I was in that vicinity hunting.

Q. Do you know what the character of that ground was—whether any of it was cleared at that time?

A. At that time there was thick brush there.

Q. There was no place cleared there at all, was there?

A. I never remember of seeing any clearing there at all till along in the eighties.

Q. Is it not a fact there was a place cleared there in 1869, and it has been clear from that time to the present, right there on that ridge?

A. I don't remember of any clearing there.

Q. Don't you know there was a house stood near the edge of that clearing on that ridge in 1876, 1877, 1878, and 1879?

A. No, sir.

Q. You were not on that ridge during those years, were you?

A. I was in that vicinity, I say, hunting.

299 Q. Were you on that ridge to which your attention has been called by Mr. Woolworth during the years 1876, 1877, 1878, and 1879?

A. I cannot state. I may have been and I might not have been.

Q. Do you know where the ravine is situated west of that ridge—the draw that comes up the slope towards the west from that ridge?

A. Yes, sir.

Q. Was there any clearing there or near that spot and on which there was a house situated and occupied by a family?

A. I do not remember of any such thing.

Q. Were you there at that place at any time during those years?

A. Yes, sir; I have been.

Q. Well, how often?

A. I am sure I do not know. I might have been there three times during a summer.

Q. What year was that in?

A. I have been there right along from 1874 or 1875—along in there.

Q. Was you there in 1876, 1877, 1878, or 1879?

A. Yes, sir; I have been there, I know.

Q. You were on that ridge and on that slope and in that ravine during those years, were you?

A. I cannot say I was on that slope, but I have been in that ravine and through there.

Q. About how often?

A. About three times a year, probably.

Q. What caused you to go through there?

A. We would go up this ravine hunting sometimes with a party.

Q. What time in the year was it?

300 A. When we would go hunting for rabbits we would go the first snow that fell.

Q. Were you there in the winter?

A. Yes, sir.

Q. Was you there hunting in the summer?

A. Yes, sir.

Q. How often?

A. Oh, two or three times.

Q. Who went with you?

A. We hunted in through there, and one of the party was Will Simeral.

Q. Who do you mean by "we"?

A. Myself and Will Simeral.

Q. Who else?

A. I cannot just name them now. I know Will Simeral was along and probably one of the Davis boys.

Redirect examination.

By Mr. WOOLWORTH:

Q. From the spring of 1879 you were on the premises much more frequently?

A. Yes, sir.

Q. What called you over there?

A. Sometimes the horses would get away and roam around through there and I would have to hunt them up or I would be driving stock or somthing like that, and they would go in there and I would have to hunt them out, and sometimes we would chase rabbits in there or hunt or something like that.

Q. Were you engaged from 1879 up until the present time

301 in raising fine cattle?

A. Well, more or less; yes, sir—that is, it was on a small scale. I had a few in those earlier days, and as it progressed my business increased.

Q. What kind of cattle were they?

A. They were Jerseys, and sometimes I had common cows, and so forth.

(Excused.)

GRAHAM P. BROWNE.

JAMES M. WOOLWORTH, a witness of lawful age, being by me first duly examined, cautioned, and solemnly sworn, deposeth and sayeth as follows:

Examined by A. J. POPPLETON:

I offer in evidence a number of tax receipts upon the premises in question, which are variously described in the various receipts. I offer, in the first place, the following tax receipts for the taxes of

Douglas county for the year 1870. The premises therein described are the premises here in question.

Defendant objects as incompetent, irrelevant, and immaterial, and the receupts have not been identified nor properly proven.

Receipt marked Ex-ibit "A."

Mr. WOOLWORTH: I will state that the signature appended to that receipt *if* the genuine signature of the treasurer of Douglas county, Nebraska, at that time—at the date of the receipt.

302 Defendant further objects to the introduction of Exhibit "A" because the so-called taxes he claims to have paid for the year 1870 were paid after the commencement of this action or just before the commencement of this action, and because it appears on the face of the paper that it is not the genuine signature of the treasurer of Douglas county.

Mr. WOOLWORTH: This paper is signed Henry Bolln, treasurer, by John Groves, his deputy, and that is the signature of the deputy, and this paper came to me out of the treasurer's office and was signed by Mr. Groves.

Q. And this is the paper to which objection has been made?

A. Yes, sir. I also offer in evidence the tax receipt for 1871. This paper was made and signed by the same person and came to me out of the treasurer's office.

(Paper marked Exhibit "B.")

Defendant objects to the introduction of Exhibit "B" for the reason that it is incompetent, irrelevant, immaterial, and not properly identified.

Mr. WOOLWORTH: I next offer the receipt for the taxes of 1866.

(Paper marked Exhibit "C.")

Defendant objects to the introduction of Exhibit "C" for the reason that it is incompetent, irrelevant, immaterial, and not properly identified, and for the reason that the taxes covered by said receipt have been paid since the commencement of this action.

Mr. WOOLWORTH: I offer next the certificate for the sale of these premises for the taxes of 1872. This paper is signed by E. C. McShane, who at that time was the treasurer of the county, and it is the genuine signature of said McShane, and he executed and gave it to me.

(Paper marked Exhibit "D.")

303 Defendant objects as incompetent, irrelevant, and immaterial and not properly identified.

Mr. WOOLWORTH: I also offer the tax receipt of the treasurer of said county for these premises for 1872, signed by said E. C. McShane, at that date the treasurer of said county. It is his genuine signature, and he gave that paper to me upon the payment of those taxes.

(Paper marked Exhibit "E.")

Defendant objects to the introduction of Exhibit E for the reason that it is incompetent, irrelevant, and immaterial and not properly identified.

Mr. WOOLWORTH: I next offer the tax receipt of the treasurer of said county for the year — for said premises. A. C. Althouse was the treasurer at that time, and that is his genuine signature.

(Paper marked Exhibit "F.")

Defendant objects to the introduction of Exhibit "F" into evidence for the reason that it is incompetent, irrelevant, immaterial, and not properly identified.

Mr. WOOLWORTH: The premises therein described are the premises in dispute. I next offer the receipt for the taxes of 1871 upon the undivided half of said premises. That receipt was given by Mr. Althouse, county treasurer, upon the payment by me of the taxes therein mentioned.

(Paper marked Exhibit G.)

Defendant objects to the introduction of Exhibit "G" for the reason that it is incompetent, irrelevant, immaterial, and not properly identified.

Mr. WOOLWORTH: I next offer the receipt for the taxes of 1874. That receipt was given to my by Mr. Althouse, the treasurer, upon payment by me of the taxes therein mentioned.

(Paper marked Exhibit "H.")

304 Defendant objects to the introduction of Exhibit "H" into evidence for the reason that it is incompetent, irrelevant, immaterial, and not properly identified.

Mr. WOOLWORTH: I next offer in evidence the receipt for 1876 on the undivided one-half of these premises. That receipt was given to me by Mr. Buck, deputy treasurer of Douglas county at that time, upon the payment by me of the taxes therein mentioned, and the premises first mentioned therein are the premises here in question.

(Paper marked Exhibit "I.")

Defendant objects to the introduction of Exhibit "I" into evidence for the reason that it is incompetent, irrelevant, immaterial, and not properly identified.

Mr. WOOLWORTH: I next offer the receipt for the taxes of 1877. That receipt was given to me by Mr. Rush—John Rush—who was at that time deputy treasurer of Douglas county, upon the payment by me of the taxes therein mentioned, and I paid them at or about the date of this receipt, and the premises first described are the undivided one-half of the premises here in question.

(Paper marked Exhibit "J.")

Defendant objects to the introduction into evidence of Exhibit "J" for the reason that it is incompetent, irrelevant, immaterial, and not properly identified.

Mr. WOOLWORTH: I next offer the receipt for the taxes of 1878. I paid the taxes mentioned in this paper to Mr. John Rush, who was at that time the deputy treasurer of the county, and the premises first described in this receipt are the premises in question.

(Paper marked Exhibit "K.")

Defendant objects to the introduction of Exhibit "K" into evidence for the reason that it is incompetent, irrelevant, and immaterial and not properly identified.

Mr. WOOLWORTH: I next offer the receipt for the taxes of
305 1880. The premises in question are described in this paper as lot six, section 28, township 15 north, of range 13 east, containing 17.75 acres. Lot six means tax lot six, by which title the property was taxed for a long time. I paid the taxes mentioned in this receipt and received from Mr. Hines, who was at that time the treasurer of the county, this receipt.

(Paper marked Exhibit "L.")

Defendant objects to the introduction of Exhibit "L" into evidence for the reason that it is incompetent, irrelevant, immaterial, and not properly identified.

Mr. WOOLWORTH: I next offer into evidence the tax receipt for 1881 to the premises in question, which are described in this receipt in the same way as in the receipt last introduced. I paid these taxes to John Rush, the treasurer, and received this receipt from him therefor at the date or about the date of the receipt.

(Paper marked Exhibit "M.")

Defendant objects to the introduction of Exhibit M into evidence for the reason that it is incompetent, irrelevant, immaterial, and not properly identified.

Mr. WOOLWORTH: I next offer the tax receipt for 1882. The premises in question are described in the same way. I paid those taxes to Mr. John Rush, the treasurer, and received this receipt from him on or about the day of its date.

(Paper marked Exhibit N.)

Defendant objects to the introduction of Exhibit "N" for the reason that it is incompetent, irrelevant, immaterial, and not properly identified.

Mr. WOOLWORTH: I next offeer the receipt for the taxes of 1883. The premises in question are described in this receipt in the
306 same way, and I paid those taxes into the treasury at or about the date of this paper and received this receipt therefore. I do not know about the deputy's signature.

(Paper marked Exhibit "O.")

Defendant objects to the introduction into evidence of Exhibit "O" for the reason that it is incompetent, irrelevant, immaterial, and not properly identified.

Mr. WOOLWORTH: I next offer the tax receipt for 1884. In this

receipt and in the following receipts the premises in question are described as Oakhurst. I paid these taxes into the county treasury and received this receipt at or about the day of its date. John Rush was at that time the county treasurer.

(Paper marked Exhibit "P.")

Defendant objects to the introduction of Exhibit "P" into evidence for the reason that it is incompetent, irrelevant, immaterial, and not properly identified.

Mr. WOOLWORTH: I next offer the receipt for the taxes of 1885. The premises here in question are herein described as Oakhurst, and I paid those taxes shown by this receipt into the county treasury and received from the treasurer this receipt. Mr. Bolln was at that time county treasurer.

(Paper marked Exhibit "Q.")

Defendant objects to the introduction of Exhibit "Q" into evidence for the reason that it is incompetent, irrelevant, and immaterial, and not properly identified.

Mr. WOOLWORTH: I offer next the receipt for 1887. The premises are here described as Oakhurst, and I paid those taxes to the county treasurer and received this receipt therefor at or about the day it bears date.

(Paper marked Exhibit "R.")

Defendant objects to the introduction of Exhibit "R" for
307 the reason that it is incompetent, irrelevant, immaterial, and not properly identified.

Mr. WOOLWORTH: I next offer in evidence the receipt for 1888. The premises are described as Oakhurst, and these taxes I paid into the treasury and received this receipt at or about the day of its date.

(Paper marked Exhibit "S.")

Defendant objects to the introduction of Exhibit "S" as incompetent, irrelevant, immaterial, not properly identified, and for the further reason that the said taxes were paid since the commencement of this action.

Mr. WOOLWORTH: I next offer the receipt for the taxes of 1867. The premises are included in the first description, the description including more than the premises in question. I paid those taxes at the date of this paper and received this receipt therefor.

(Paper marked Exhibit "T.")

Defendant objects as above.

Mr. WOOLWORTH: The city taxes—I offer the receipt for 1872, and the premises therein described are the premises in question. I paid those taxes to the city treasurer, Truman Buck, who was at the time of the date of this receipt the city treasurer and I received this receipt therefor about the day it bears date.

(Paper marked Exhibit "U.")

Defendant objects to the introduction of Exhibit "U" into evidence as incompetent, irrelevant, immaterial, and not properly identified.

Mr. WOOLWORTH: I offer in evidence the receipt for the city taxes of 1873. The premises therein described are the premises in controversy and I paid those taxes into the treasury at or about
308 the date of this receipt to Truman Buck, who was at that time city treasurer.

(Paper marked Exhibit "V.")

Defendant objects to the introduction of Exhibit "V" for the reason that it is incompetent, irrelevant, immaterial, and not properly identified.

Mr. WOOLWORTH: I offer next the receipt for 1875. The premises in question are those secondly described in this receipt. I paid those taxes into the city treasury to Mr. Hartman, the deputy city treasurer, and received this receipt therefor.

(Paper marked Exhibit "W.")

Defendant objects to the introduction of Exhibit "W" into evidence for the reason that it is incompetent, irrelevant, immaterial, and not properly identified.

Mr. WOOLWORTH: I offer next the receipt for 1871. The premises therein described are those here in question. I paid those taxes into the city treasury and received this receipt therefor at or about the day of its date.

(Paper marked Exhibit "X.")

Defendant objects to the introduction of Exhibit "X" for the reason that it is incompetent, irrelevant, immaterial, and not properly identified.

Mr. WOOLWORTH: I next offer the receipt for the taxes of 1876. The premises are those secondly described in this receipt. I paid those taxes into the city treasury and received this receipt therefor at or about the date of its receipt to Mr. Hartman, who was then the city treasurer.

(Paper marked Exhibit "Y.")

Defendant objects to the introduction of Exhibit "Y" into evidence for the reason that it is incompetent, irrelevant, immaterial, and not properly identified.

309 Mr. WOOLWORTH: I offer next the receipt for 1877. I paid those taxes shown by this receipt, and the premises in question are those lastly described for real estate in the receipt. I paid them to Mr. Hartman, city treasurer, at or about the date of this receipt, and received this receipt therefor.

(Paper marked Exhibit "Z.")

Defendant objects to the introduction into evidence of Exhibit "Z" for the reason that it is incompetent, irrelevant, immaterial, and not properly identified.

Mr. WOOLWORTH: I next offer the receipt for 1880. I paid those taxes into the city treasury, to Mr. Buck, the then city treasurer, at or about the date of this receipt, and the premises therein described are the premises in question.

(Paper marked Exhibit "A A.")

Defendant objects to the introduction of Exhibit A A into evidence for the reason that it is incompetent, irrelevant, and immaterial, and not properly identified.

Mr. WOOLWORTH: I next offer into evidence the receipt for 1881. The premises are those lastly described for real estate in this receipt. I paid the taxes and received this receipt therefor at or about the date of this receipt from Mr. Mallette, who was at the time city treasurer.

(Paper marked Exhibit "B B.")

Defendant objects to the introduction of Exhibit "B B" into evidence for the reason that it is incompetent, irrelevant, immaterial, and not properly identified.

Mr. WOOLWORTH: I next offer a receipt for the taxes of 1881. The premises are herein described as in section 28, lot six, being tax-lot six. I paid those taxes into the city treasury, to
310 Mr. Buck, who was the then city treasurer, and received his receipt therefor at or about the date of the receipt.

(Paper marked Exhibit "C C.")

Defendant objects to the introduction of Exhibit "C C" into evidence for the reason that it is incompetent, irrelevant, immaterial, and not properly identified.

Mr. WOOLWORTH: I offer next the receipt for the taxes of 1882. The premises are here described as lot six. I paid those taxes at or about the date of this receipt, and received from Mr. Buck, the city treasurer, this receipt therefor.

(Paper marked Exhibit "D D.")

Defendant objects to the introduction of Exhibit "D D" into evidence as incompetent, irrelevant, immaterial, and not properly identified.

Mr. WOOLWORTH: I next offer the receipt for 1884. It is the receipt for taxes on lot one, block one, in Oakhurst; that is for the taxes on lot one, block one, of Oakhurst. These taxes were paid by Mr. Sage, to whom I had sold the lot, and I reimbursed for the taxes that this receipt covers and which he had taken from the city treasurer.

(Paper marked "E E.")

Defendant objects to the introduction of Exhibit "E E" into evidence for the reason that it is incompetent, irrelevant, immaterial, and not properly identified.

Mr. WOOLWORTH: I next offer the receipt for the taxes of 1884. I paid those taxes upon the lots herein described as in Oakhurst, at

or about the date of this receipt, and took this receipt from the city treasurer therefor.

(Paper marked "F F.")

Defendant objects to the introduction of Exhibit "F F" for the reason that it is incompetent, irrelevant, immaterial, and not properly identified.

311 Mr. WOOLWORTH: I offer next the receipt for the taxes of 1885. The premises in question are herein described as Oakhurst. I paid those taxes into the city treasury and received this receipt therefor at or about the date of the receipt.

(Paper marked Exhibit "G G.")

Defendant objects to the introduction of Exhibit "G G" as incompetent, irrelevant, immaterial, and not properly identified.

Mr. WOOLWORTH: I next offer in evidence the receipt for the taxes of 1886. I paid those taxes, the taxes shown in this receipt, at or about the date of the receipt, and the premises in question are described therein as Oakhurst, and received this receipt therefor.

(Paper marked Exhibit "H H.")

Defendant objects to the introduction of Exhibit "H H" as incompetent, irrelevant, immaterial, and not properly identified.

Mr. WOOLWORTH: I next offer the receipt for 1886 for lot seven, in block one, for the county taxes. That lot had been overlooked on the former payment of taxes, and I paid the taxes and obtained this receipt at or about the day it bears date.

(Paper marked Exhibit "I I.")

Defendant objects to the introduction of Exhibit "I I" into evidence for the reason that it is incompetent, irrelevant, immaterial, and not properly identified.

Mr. WOOLWORTH: I next offer the receipt for the taxes of 1886. I paid those taxes shown by this receipt, and received from the city treasurer the receipt for the payment at or about the day of its date.

(Paper marked Exhibit "J J.")

Defendant objects to the introduction of Exhibit "J J"
312 into evidence for the reason that it is incompetent, irrelevant, immaterial, and not properly identified.

Mr. WOOLWORTH: I next offer the receipt for 1887. I paid those taxes shown by this receipt to Mr. Rush, city treasurer, at or about the day of its date, and received this receipt therefor.

(Paper marked Exhibit "K K.")

Defendant objects to the introduction of Exhibit "K K" for the reason that it is incompetent, irrelevant, immaterial, and not properly identified.

Mr. WOOLWORTH: The receipt for 1888. I paid taxes shown by this receipt to Mr. Rush, city treasurer, at or about the date of the

receipt, and received this receipt therefor; also at the same time special city taxes for the grading of Poppleton avenue. The taxes shown there I paid at or about the date of the receipt, and received this receipt therefor (paper marked Exhibit- "L L" and "M M"), and also for the grading taxes on 2-th street.

Defendant objects to the introduction of Exhibits "L L" and "M M" into evidence for the reason that it is incompetent, irrelevant, immaterial, and not properly identified, and as having been paid since the commencement of this action.

Mr. WOOLWORTH: The special taxes for sidewalk for 1889. I paid those taxes at or about the date of the receipt to Mr. Rush, city treasurer, and took this receipt therefor.

(Paper marked Exhibit "N N.")

Defendant objects to the introduction of Exhibit "N N" for the reason that it is incompetent, irrelevant, immaterial, not properly identified, and said taxes were paid since the commencement of this action.

Mr. WOOLWORTH: And also the special taxes assessed upon
313 a part of the premises in question for the grading of 36th street from Leavenworth to Park street-. I paid those taxes at or about the date of the receipt, and took this receipt therefor.

(Paper marked Exhibit "O O.")

Defendant objects to the introduction of Exhibit "O O" into evidence for the reason that it is incompetent, irrelevant, immaterial, not properly identified, and for the reason that said taxes were paid since the commencement of this action.

Mr. WOOLWORTH: I also offer the receipt for the taxes of 1889. I paid the taxes shown by this receipt at or about the date thereof to Mr. Rush, the city treasurer, and received this receipt therefor.

(Paper marked Exhibit "P P.")

Defendant objects to the introduction of Exhibit "P P" into evidence for the reason that it is incompetent, irrelevant, immaterial, and not properly identified, and for the further reason that said taxes were paid since the commencement of this action.

Plaintiff offers in evidence the original summons issued out of the district court of Douglas county, Nebraska, in a suit wherein Heyman Glass is plaintiff and Roswell G. Pierce is defendant.

(Paper marked "Q Q.")

Plaintiff offers in evidence the order of attachment issued in said suit.

(Paper marked Exhibit "R R.")

Plaintiff offers in evidence a deed from Thomas McCullough and others to this plaintiff.

(Paper marked "S S.")

Defendant objects as incompetent and because it is not executed and acknowledged according to the laws of the State of Nebraska;

and for the further reason that no authority is shown for any
314 of these parties to make a deed for the premises in question and because it is irrelevant and immaterial.

Plaintiff offers in evidence a deed from Oliver P. Morton and wife to this plaintiff of the premises in question.

(Paper marked Exhibit "T.")

Defendant objects because long prior to the date of this deed the premises in controversy had been conveyed by Oliver P. Morton to William S. T. Morton and prior to the commencement of this action had been conveyed by Oliver P. Morton and wife to William S. T. Morton.

Plaintiff offers in evidence a deed of Thomas McCullough and others to plaintiff confirmatory of the deed first introduced.

(Paper marked Exhibit "U U.")

Defendant objects to the introduction of Exhibit "U U" into evidence as incompetent, because no authority is shown for these parties, Thomas McCullough and W. A. Peele, to execute a deed for the premises in question, and because it was executed long after the filing of plaintiff's bill in this case and as irrelevant and immaterial.

Plaintiff offers in evidence a certified copy of the pleadings and decree in the case of Oliver P. Morton against Roswell G. Pierce and others in the district court for Douglas county, Nebraska.

(Paper marked Exhibit "V V & W W.")

Defendant objects as incompetent, irrelevant, immaterial, and because the premises described in the plaintiff's bill in this action, *in* which this purports to be a transcript, are not the premises in controversy.

Hereupon and adjournment was taken until two o'clock
315 p. m. of this day.

Afternoon Session.

TWO O'CLOCK P. M.

Examination of JAMES M. WOOLWORTH continued:

Defendant further objects to the introduction of Exhibit "V V" into evidence for the reason that the premises therein described are as follows: "Beginning at the northwest corner of section 28, township 15 north, of range 13 east, thence south eight and five one-hundredths chains; thence east 85° east twenty and ten one-hundredths chains; thence north nine and seventy one-hundreths chains, and thence west to the place of beginning; and the same being the description in the decree rendered in said cause, of which this purports to be a transcript, and they not being the premises in controversy, and because all of the right, title, and interest of Roswell G. Pierce and Heyman Glass had in and to said lands in controversy had been conveyed prior to the commencement of this action to Allen Root, the defendant in this cause.

By Mr. POPPLETON:

Q. You are the plaintiff in this case?

A. Yes, sir.

Q. Do you wish to make any statement in respect to the suit brought by Oliver P. Morton about August, 1870, in respect to these premises? And, if so, you may proceed in your own way to make your statement.

316 Defendant objects to any statement being made by the witness without any question being asked, and to which the defendant can enter his objection, as improper, incompetent, and unfair.

A. Some little time before that bill was filed—two or three months before—Mr. William S. T. Morton came to see me with reference to the title to these premises and other litigations which I then had and litigations which I had had previously for him and other business. I had previously advised him to the effect that the deed had appeared upon record of the county from Glass of the land to Mr. Root, which antedated the decree which I had obtained for Oliver P. Morton *on* the district court of the Territory. The fact of that deed appearing on the record came to my knowledge within a year from the time William S. T. Morton came here, but I cannot state exactly when I advised Mr. Morton that it was necessary to take steps to enforce that decree against Allen Root and obtain a further decree against him of the same character which I had obtained against Glass. William S. T. Morton was a brother of Senator Oliver P. Morton, and Mr. William S. T. Morton advised me that his brother had an interest in the litigations together with him which I had had and which I believe were in the name of William S. T. Morton, and perhaps one of them was in the name of Oliver P. Morton or he was a party. I do not recollect about that, but William S. T. Morton produced to me a writing which was in his handwriting, but was signed by himself and Oliver P. Morton, the exact terms of which I cannot very distinctly recollect beyond this fact that——

317 Defendant objects to a statement by the witness of the contents of any written instrument whatever without the production of the instrument or accounting for the loss of it, and he objects to this mode of proceeding as unfair, unprofessional, and as contrary in every way to the decent practice of law.

Plaintiff objects to the objection of the defendant *is* unprofessional and unfair and as made for the purpose of prejudicing the case of the plaintiff.

A. This writing which I have referred to recited some dealings between these parties in respect to these litigations and that the title to these premises was again involved in litigation, and to the best of my recollection that instrument was neither witnessed nor acknowledged, and although somewhat lengthy was rather informal and was in effect in its terms a conveyance, but it may have been

nothing but an agreement for a conveyance of these premises from Oliver P. Morton to William S. T. Morton. William S. T. Morton——

Defendant moved to strike out the answer of this witness as to the contents of the written instrument, which has not been produced nor the loss of which has not been accounted for from the record, as incompetent.

A. William S. T. Morton stated that he and his brother had cancelled the settlement—the previous settlement; I do not know whether it was complete or partial—of some of their dealings, in the course of which William S. T. Morton had taken these premises, and the question arose between us in whose name any suit should be brought, and my recollection is he had with him a conveyance previously made by Senator Morton to himself, but I cannot
318 speak certainly about that. I do not know but I examined one with him. I know that he and I went to the county clerk's office and examined the title to the land, and we may have instead looked at the original instrument or looked at a copy of it; but on account — there being but one witness to the deed from Oliver P. Morton to William S. T. Morton I advised him that it would be necessary to bring an action in the name of Oliver P. Morton, and by his direction I accordingly brought suit in that way, and afterwards, I think, in the following winter—I am very certain it was the following winter, but I cannot tell exactly the part of the winter—I saw Senator Morton in Washington, but I think I had met him before, and I had a conversation with him about these interests, and he confirmed the statement that William S. T. Morton had made to me with reference to the cancellation of the agreements or settlements they had previously made, and accordingly I brought this action, the record of which I introduced this afternoon.

Q. In the name of whom?

A. In the name of Oliver P. Morton.

Q. Is there anything else in that connection?

A. I do not think of anything else.

Q. How long have you owned and been in the actual possession of the premises in controversy known as Oakhurst?

A. Mr. William S. T. Morton came here after the recovery of the decree in 1873, and he and I made a settlement for my services, and in consideration of them—I think my bill amounted to one thousand dollars, consisting partly of money paid out and partly of professional services, and on account of those services and those
319 expenditures he agreed that Mr. Oliver P. Morton should convey to me an undivided one-half of the premises here in question, and that was done. I say that was in 1873. I, of course, only remember that with reference to the date of the decree. I may be mistaken in the year.

Q. Who has paid the taxes upon these premises from that time up to the present?

Defendant objects as immaterial.

A. I paid all the taxes on the undivided one-half of the premises from the time Oliver P. Morton deeded to me, and some of the years between that and 1879 I paid all of them, being reimbursed by William S. T. Morton. At any rate, from the time that the executors of William S. T. Morton conveyed the undivided one-half of these premises to me, from the time I got title to the whole of the premises, whe-ver that was, I have paid all the taxes every year from that time down to this. I believe there was lacking one or two years, for which years I did not produce receipts for the taxes, but I have those receipts.

Q. State whether or not during that time you ever heard of Allen Root's paying or offering to pay the taxes upon these premises.

Defendant objects as immaterial.

A. No, sir.

Q. State the frequency and extent of your examination of and inspection of these premises from the time you became interested in them, and what you know of their occupancy by any person.

Defendant objects as incompetent, irrelevant, and immaterial.

320 A. From the time I brought the second suit, in 1870, until the present time I have been over these premises frequently, and I have been upon those premises very frequently, and much more frequently since I obtained title to both undivided halves of the premises. Sometimes I would walk across on the streets which makes the northern boundary of these premises, that for a long time being impassible for a buggy or carriage, and I have driven across to what is now Poppleton avenue to go over the premises, and I have gone over the premises very frequently as a man would when he supposed he owned them. In 1882 I offered Brownell hall five acres of these premises if it would build its proposed building for that institution—a girls' school—on these premises. I don't think I had ever gone through the grounds, the woody parts, before that time, but I may have done so, but I do not remember of it if I did, and the exact location of the five acres was not determined; and for the purpose of determining what five acres would be the best for that purpose I went over the grounds in company with Mr. George W. Ames, the last Ames who was examined, and he and I went over these premises and through the woods very carefully with a view of selecting a site for that building. That was in the early spring of 1883. My recollection is that it was before I had the land surveyed into lots, but it might have been afterwards. It was early in 1883 that he and I went through these premises very carefully, and we then found on the west slope of the first ridge as you come east from the poor-house an old stable or building that was disused or apparently had been disused a long time. It was in a dilapidated condition and was toward the south part of these prem-
321 ises, towards the south line and just within the timber. I do not think I ever knew of that building being there. I have

no recollection of it until that time, and both of us were somewhat surprised to find a building there.

Q. Was this building in the timber or in an open space?

A. My recollection is that the timber was thinner a good deal where this shed was than it was further to the east, but it was in the timber; yes, sir.

Q. What other, if any, sheds, shanties, or structures of any description did you ever find on the premises after they came into your possession?

A. It is barely possible that in the earlier part of the time that I owned the premises there were from time to time shanties or structures on this land, but my recollection would have been there were none, but there might have been and I have known it, but they were temporary structures, and they were occupied by persons who were on the premises temporarily.

Q. State whether or not you ever knew of any persons occupying or attempting to occupy the premises adversely to your ownership.

Objected to as incompetent and calling for the opinion of the witness and to state a question of law in this case.

A. I never did. I never heard of any claim of that sort until shortly before this suit was brought, when Mr. Birkhouser came into my office and told me that Mr. Root had gone on these premises and put up a house and fenced the premises and was undertaking to make leases to different parties.

Q. Previous to that time had Mr. Root ever come to you
322 or ever notified you in any form or manner that he claimed the ownership of these premises?

Defendant objects as incompetent, irrelevant, and immaterial.

A. No, sir; he never spoke to me about these premises at all.

Q. State where he lived in the meantime and during your ownership of these premises.

Objected to as incompetent and as assuming the ownership of the premises, irrelevant, and immaterial.

A. Some of the time, I believe, Mr. Root lived in town. He lived in town at one time, but whether he has lived in town during the time I have owned these premises I cannot state with certainty, but of late years he has lived upon a farm 6 or 7 miles west of Omaha, which adjoins a farm which I own.

Q. What opportunity had he, if he claimed any interest in these premises, to advise you of it?

Defendant objects as irrelevant and immaterial.

A. Why, we both lived in the same town, and once in awhile we passed one another on the road and in the street, and I suppose he could have easily spoken to me about it if he had any claim to these premises.

Q. Do you know, and, if so, you may state, how Mr. Root came to occupy these premises in 1888 and came to put up a house there?

Defendant objects as immaterial and incompetent.

A. Why, sir, there have been litigations—protracted and serious litigations—between the owners of the rest of this eighty, known sometimes as the north eighty—between squatters on these
323 premises and the owners of them, one of these squatters being Theodore Gallagher, one of the witnesses in this case, and I suppose that the trouble which those squatters made for the owners of those premises held out some inducement to Mr. Root to get these premises away from me.

Defendant moved to strike out the answer from the record as incompetent, irrelevant, and immaterial.

Q. State whether or not Mr. Birkhouser is a partner of Mr. Covell.

A. I do not know whether he is or not, but they keep the same or adjoining offices, or did at that time.

Q. At the time that Mr. Birkhouser made this communication to you did he profess or appear to speak for Mr. Covell?

Defendant objects as immaterial and incompetent.

A. I do not know that he did.

Q. Is there any other fact in respect to your possession of these premises that you wish to state? If so, you can do it without further questioning.

A. I will state that I bought from the executors the undivided half of these premises and paid them $430 for them, and I bought these premises supposing the title of their testator was good, and neither they nor any of William S. T. Morton's heirs or legatees ever made any claim to me of any interest or any claim that ever came to my knowledge, and I confidently reposed upon the title which I had, and I laid these premises out into an addition or caused them to be laid out, and the plat to be filed, and I put the lots on the market, and then, when it was determined that Brownell hall should not go there, I withdrew the tract from the market, as the location of the hall there was an inducement for parties
324 to locate there.

Q. State whether or not when you made this plat and laid out the premises into an addition to the town under the name of Oakhurst and applied to the city of Omaha to have it adopted, for the necessary steps to have it taken and adopted to the public use, Allen Root, Mr. Covell, or any one in his interest made any objection to the city of Omaha or otherwise.

Defendant objects as incompetent, irrelevant, and immaterial.

A. No, sir; he never made any objections to it.

Q. Did you ever hear from them on that subject?

A. I never did.

Q. In the commencement of your testimony you spoke of a certain writing that William S. T. Morton brought here with him and that was in his possession. Do you know where that writing is?

A. No, sir.

Q. Has it ever been in your possession?
A. No, sir.
Q. And it is not in your possession now?
A. No, sir.
Q. Did he take it away with him, so far as you know? Q. Did he take it?
A. Yes, sir; that instrument covered some other interests besides this tract of land, and he needed it on that account.

Cross-examination.

By G. W. COVELL:

325 Q. When you commenced the action in the Federal court against Allen Root you knew of the existence of a conveyance from O. P. Morton to William S. T. Morton for the whole of the premises in controversy, did you not?
A. Yes, sir.
Q. Did you have the instrument in your possession conveying the premises to William S. T. Morton prior to the time of the commencement of that action?
A. I cannot tell whether I had or not. It is very likely I had, for I had a great many papers both of Senator Morton and his brother.
Q. Is it not a fact that you placed of record the instrument conveying this property to William S. T. Morton, the one made in August, 1869?
A. It is very possible I did. I do not remember, but it is very likely.
Q. Knowing this fact, still you commenced the action in the name of Oliver P. Morton?
A. Yes, sir.
Q. Now, you may state whether or not, in the progress of the proceedings in the case of Oliver P. Morton against Allen Root, it was ever brought by you to the knowledge of the court that this deed existed and was of record from Oliver P. Morton to William S. T. Morton for the whole of the premises in controversy.
A. I do not think I did, but I do not remember.
Q. You may state whether there was any mention of it in the testimony in the case that was taken in the Federal court.
A. I do not think there was.
326 Q. You may state whether or not it was brought to the knowledge of the court in any way or manner that the title to the premises in controversy had passed from Oliver P. Morton to William S. T. Morton before the commencement of that action in the Federal court.
A. I do not think it was, but I do not remember.
Q. Is Oliver P. Morton alive or dead?
A. He is dead.
Q. When did he die, if you know?
A. I do not remember, but my impression is that he died between 1875 and 1880.

Q. Is William S. T. Morton alive or dead?

A. He is dead.

Q. When did he die?

A. He died in 1875.

Q. You may state, if it be a fact that there was such a writing in existence, as you have mentioned in your direct testimony, existing between Oliver P. Morton and William S. T. Morton, that this writing never came into your possession, you being Oliver P. Morton's counsel and William S. T. Morton's counsel.

A. That writing covered other dealings between those two brothers and I presume William S. T. Morton preferred to keep it on that account.

Q. State whether or not you ever had a copy of that writing.

A. No, sir.

Q. State whether or not you took a copy of it or an abstract of it when you saw the writing.

A. No, sir; I do not know whether I did or not.

327 Q. Was any proof made to the Federal court in the action which you h-ve introduced a transcript here to-day as to there being any such writing in existence between the parties, O. P. Morton and William S. T. Morton?

Plaintiff objects for the reason that the proofs in the original case are in writing and show for themselves.

A. I have no recollection, but I presume there was not.

Q. Then the whole matter, that matter, as well as the matter of the existence of the deed conveying the whole of the premises in controversy to William S. T. Morton, was kept from the court, was it?

A. No, sir; it was not kept from the court. The de-d from Oliver P. Morton to William S. T. Morton was not legal on this account, and I alleged in the bill, and that allegation was true, the title to be in Oliver P. Morton, and Oliver P. Morton, at the time of the filing of this bill, did own the premises, an- they were his in equity and, I think, in law. The defendant did not produce that deed, or a certified copy of it, from O. P. Morton to William S. T. Morton, and if he had I should have met him by showing the reconveyance or the agreement for a reconveyance, whichever it was, from William S. T. Morton back to Oliver P. Morton.

Q. But you knew of the existence of these two conveyances or writings, whatever they may have been, and did not bring it to the knowledge of the court in any way or manner?

A. I do not think I did. I did not feel called upon to do it. If the point had been made I should have met it. If that

328 objection had been made to the title of Oliver P. Morton, as alleged in the bill, I should, as I would have had authority to do from William S. T. Morton, have inserted his name in place of Oliver P. Morton, and the suit would have proceeded in the name of William S. T. Morton, but I did not feel called upon to take any such a course.

Q. On your examination-in-chief you swore that Mr. Birkhouser

was a partner of mine. Don't you know that Mr. Birkhouser is in business for himself and has no connection with me, except his office adjoins with me?

A. At the time this suit was brought you and he were occupying the same office.

Q. Which office?

A. It was an office in what was then known as the Paxton block.

Q. Don't you know that Mr. Birkhouser is in the real-estate business and in partnership with Mr. Bloomer, and did you not know it was a fact at that time that he and I never had any business connection?

Q. I did not testify that you were partners.

Q. You stated I was a partner of his.

A. No, sir; I did not so state, as the record will show. I did say you were together in the same office at that time, and I thought you were in the real-estate business together and I think so now.

Q. It is not a fact and you know it to be.

Q. When you state I know it to be a fact that you are not a partner of his you state something that is not true.

Q. Is it not a fact that you know I have been engaged in the practice of law and nothing else since you have known me
329 here in Omaha, and that I only purchase real estate for myself?

A. Well, sir, you came to me at one time to buy one block of these premises and pretended to represent a building association, and we agreed on the price of the block, which was $25,000, but, as you did not want to pay anything down, and that was not satisfactory to me, and you wanted to build a less number of houses on the premises than I thought was right, I refused to sell to you, and I judged from that that you were in the real-estate business. You also talked to me about buying other pieces of real estate, and I think you were in the real-estate business.

Q. And from those you judge I was in the real-estate business?

A. I know you have been practicing law, but our principal business was to prosecute stale and fictitious claims to property, and that has been your principal legal business.

Q. Don't you think that is nice and professional?

A. I think that is proper for me to state on the cross-examination by you.

Q. I might retaliate and ask you how you got title to your property, but I won't do that. I try to be decent and professional.

A. But you are not very successful at it.

Q. Have you subpœnæd any of the witnesses to give their testimony here to-day except Mr. Griffin?

A. I do not think any subpœnas have been issued but for Mr. Griffin.

Q. In what way and in what manner were these witnesses
330 brought here to testify in this case to-day?

A. I presume they were brought here by request of Mr. Pinneo or Mr. McMahon.

Q. Are Pinneo and McMahon in your employ?

A. Yes, sir.

Q. As detectives?

A. No, sir; they are not in my employ as detectives. I employed them to prosecute vigorously inquiries into the matters in controversy in this case so far as possession is concerned, and to find out if they could if there was any such a man as Pierce and where he was and what his business was, and if there was any such man as Akin and where he was and what his business was, and if I could get them here to testify in this case, and they have traversed a good part of this western country for that purpose.

Q. This man Murphy that you had on the witness stand and these other witnesses who have been brought here, except those who have been subpœnaed, were brought here by those two men?

A. Murphy and I had a conversation about these premises 2, 3, or 4 weeks ago. I sent for Murphy. I sent a man out to Murphy's house to get him to come in and see me, and he came and saw me, and I talked with him about what he knew about the premises, and I asked him to come and testify, and he said that he would whenever I wanted him, and he would bring his wife, and I told Mr. Pinneo that I was going to have this examination to-day and to let Murphy know it and have him come in, and I also saw Mr. Doll and talked with him about it, and he said that he would
331 come and testify in this case whenever I wanted him to, and I sent word to him, and he came in pursuance to his promise.

Q. You spoke in your testimony-in-chief something about Brownell hall—that you expected Brownell hall to be located on a part of those premises. You may state whether or not it is a fact that the people, prior to the location of the hall, refused to put it there because they found upon investigation the title to this property was in dispute.

A. I offered Brownell hall 5 acres of these premises as a gift on condition that they build there. That offer was made in the winter of 1882–'3 or in the spring of 1883, and that offer was accepted by the bishop—Bishop Clarkson, who was the president of the board of trustees. Mr. Daugherty, who was the rector of this school, made an examination of these premises and accepted the piece of ground which I had selected for the school, and they went out there and hauled timber out there to build, and began to build a fence, and they built more or less of the fence after I had made the addition to the town, and the architect, Mr. Darrow, advised them that the building of the school building on the premises I offered to them would call for an expenditure of five or six thousand dollars for foundations more than if the building was on a level place, and solely on account of that, and not at all on account of any defect in the title, the acceptance of my offer was withdrawn with my consent. My consent was first asked, and if I was willing to recede from and allow them to recede from what they had done, and I said certainly, and they did so.

Q. You may state, if you know, what business these two men, Pinneo and McMahon, are in.

332 A. I cannot speak with reference to McMahon, but Mr. Pinneo is employed by the B. & M. railroad, but just exactly what his duties are I do not know, but it is more or less in the way of looking up testimony in cases which they have in court.

Q. Are you an attorney for the B. & M. railroad?

A. Yes, sir; I am employed by them.

Q. Can you *satete* as a matter of fact that you never had any knowledge of Allen Root claiming to be the owner of the premises in controversy until in 1888?

A. Yes, sir; I do emphatically.

Q. Do you state as a matter of fact you never had any knowledge he claimed to have any interest in the premises in controversy prior to the year 1888?

A. He did claim to have an interest in these premises from 1865 and 1873, I should say, or about that time, until I recovered a decree in this court in 1873, and from that time to this he has never claimed any interest in these premises in any way, shape, or manner until, without my knowledge and without any knowledge of his purpose, he went upon this land and put up a house and build a wire fence around the premises in 1888.

Q. You may state whether you have ever been in the actual occupation and the actual, open, notorious, adverse, and hostile possession of these premises.

A. If the payment of taxes for a period extending from 1873 to the present time and the laying out of these premises into and addition to the town, the advertising of the property for sale,

333 the sale of lots, the dedication of streets and alleys to the public use, the grading of these streets and alleys by the city, and the payment by myself of the taxes and assessments made thereon, and the cutting of all the timber thereon and appropriating it to my own use constitutes possession, then I have been in possession. If the building of any buildings or any fence upon these pr-mises is necessary to make such a possession as you ask for, I have not done so.

Q. Have you enclosed the premises or any part of the premises at any time with any sort of a fence, or built any buildings upon the premises in controversy?

A. I have never built any fence on the premises. I cannot state with reference to building a house. I have an indistinct recollection, but it is too indistinct for me to speak with any definiteness about that. I think Mr. Morton built a house or shanty when he was there the last time before he died, and that I paid for a part of that house, but I should not have testified to these facts on direct examination, and I only state it now because while I have an indistinct impression there was something of that sort I cannot state it with any confidence.

Redirect examination:

Q. Of what State were both Oliver P. Morton and William S. T. Morton citizens?

A. They were citizens of the State of Indiana.

Q. Did Allen Root ever appeal from the decree obtained by you against him in 1873?

334 A. No, sir.

Recross-examination.

By Mr. COVELL:

Q. After you knew that Mr. Root was in possession of those premises, state if you ever demanded possession of them from him.

A. No, sir.

JAMES M. WOOLWORTH.

(Excused.)

335 WILL. BROWN, JR., a witness of lawful age, being by me first duly examined, ca-tioned, and solemnly sworn, deposeth and sayeth as follows:

Examined by J. M. WOOLWORTH:

Q. State your name, age, occupation, and place of residence.

A. Will. Brown, Jr.; age is 22 years; pay clerk in the Union Pacific, and reside at 37th and Leavenworth streets.

Q. How long have you lived where you live now?

A. Since 1879. We came there April 17th, 1879.

Q. Do you know the premises in question and now known as Oakhurst?

A. My idea of its boundaries is upon the west 36th and upon the east 33d street, and Poppleton avenue on the south, and it extends north to Rasmussen's. I do not know the name of the street.

Q. How long have you know- these premises?

A. I have known those since a year and a half after we moved up there.

Q. What took you over there?

A. Well, we used to go through those woods chasing stock through there, and for different reasons.

Q. How much were you over the whole tract?

A. Well, I expect I have been all over it, but of course I may have gone over parts of it more frequently than the others.

Q. I want to call your attention particularly to the west slope of the first ridge as you come east from the poor farm.

A. That slopes east.

336 Q. The slope that runs to the west from the top of the ridge, the slope of it to the west, how frequently were you along on that part of the tract?

A. I expect I have been there at least a half a dozen times.

Q. Were you there in 1880?

A. I do not believe I was.

Q. Were you there in 1879?

A. I don't believe I ever went over there when we first moved up there.

Q. Were you there in 1882?

A. I cannot say, exactly; but along about that time I was along

through there, but along from 1882, maybe to 1885 or 1886, I have been through there quite frequently—all through there.

Q. What were you doing there?

A. We often had stock get loose and go over there in those woods which is all around through there, and we used to go over there in hunting parties when we first moved up there.

Q. State whether or not, from the time you first began to go over there and on for two or three years after, you saw any house there.

A. I don't recollect of seeing any house of any kind there except the Rasmussen house. That is over on the other side of the tract. That is the only house I recollect of seeing.

Q. Which side of the tract was that?

A. That is across the street; that is not on Oakhurst; that is the only house I saw in the woods there.

Q. Which side of Oakhurst was Rasmussen's house?

A. On the north.

Q. On the north side of these premises in controversy?

337 A. Yes, sir.

Q. If anybody had been living on there would you have been sure to know it?

A. I think I should.

Cross-examination.

By G. W. COVELL:

Q. On that ridge and on that slope west from that ridge and near the draw or ravine there to which your attention has been directed was there a clear spot there or not at the time you say you were there?

A. There was some woods in there, but I don't recollect just how much.

Q. Was there any part of it cleared up at that time, or grubbed out?

A. There was some of it; Doll commenced cutting wood over there.

Q. Prior to that time and on the west slope of that ridge and down near the ravine or near the draw was not there a clear spot?

A. If there was an opening it must have been very small, for I do not recollect it.

Q. What year do you say you was first there?

A. I was there probably in 1881. I did not go around there much when we first moved up.

Q. In 1882 did you go there much?

A. Yes, sir; I probably was there from that on until 1885 or 1886.

Q. Do you recollect of being on the west slope of that ridge to which Mr. Woolworth directed your attention particularly at any time during those years?

A. I have been all through there.

338 Q. And you do not recollect of seeing a clear spot there at all, do you?

A. I don't recollect it, but there might have been, though.

Q. If there had been would you have been sure to see it?

A. I think I would.
Q. Were you subpœnaed to be here to-day as a witness?
A. I was ordered here.
Q. Was there any officer served a subpœna on you to come here as a witness?
A. No, sir.
Q. Have you been paid any fees?
A. No, sir.
Q. You are here voluntarily as a witness, are you?
A. I was asked to come.
Q. Who asked you to come?
A. That gentleman. I don't know what his name is.
Q. That gentleman there?
A. Yes, sir.
Q. Is he a detective?
A. I don't know. I think it is McCann.
Q. Is it McCann or McMahon?
A. I don't know.
Q. When did he first see you?
A. He was up to the house about 3 weeks ago.
Q. What did he say to you about what -estimony you were going to give here to-day?
A. He did not say anything.
Q. Q. Did he ask you what you would testify to?
A. He asked me what I knew.
339 Q. What did you say to him?
A. I told him what I knew.
Q. Do you remember anything he said to you?
A. Why, I remember he asked me what I knew about it.
Q. Did Mr. Woolworth say anything to you about this matter at all?
A. No, sir.
Q. He never talked to you about it till he put you on the stand, did he?
A. No, sir.
Q. And you had no conversation with him about what you would testify to, had you?
A. No, sir.
Q. But only with this man McMahon here?
A. Yes, sir.
Q. When did he come to find you—in the daytime or night-time?
A. In the daytime.
Q. Where—at your residence?
A. Yes, sir.
Q. Did he tell you whose employ he was in?
A. No, sir.
Q. Did he promise you any money if you would come and testify?
A. No, sir.
Q. And you had no conversation whatever with Mr. Woolworth?

A. No, sir.

Q. And he knew nothing from you as to what you would testify to before you came here?

A. No, sir.

WILL BROWN, JR.

(Excused.)

340 GEORGE C. AMES, a witness of lawful age, being by me first duly examined, cautioned, and solemnly sworn, deposeth and sayeth as follows:

Examined by Mr. WOOLWORTH:

Q. State your name, age, place of residence, and occupation.

A. George C. Ames; age is 60 years; real estate; and my residence is Omaha, Nebraska.

Q. Are you acquainted with the premises in question in this case?

A. Well, I suppose it is the ground called Oakhurst?

Q. Yes, sir.

A. Yes, sir; I know them very well.

Q. When did you first become acquainted with these premises?

A. In the spring of 1883—early in the spring of 1883—or in the winter, perhaps.

Q. Did you ever have any business connection with the premises?

A. Yes, sir; we acted as your agent in the matter.

Q. The agent of whom?

A. James M. Woolworth.

Q. When were you employed as my agent?

A. I think it was in the winter of 1883, probably along in February, I should think, but I don't know the exact date.

Q. State whether or not you ever went over the premises.

A. I went over the premises very many times.

Q. When did you first do so?

A. Well, I should think along in April; perhaps about the 20th.

Q. How frequently after that for the following two years?

A. Oh, very often for the first year. I was out there, on an average, once a week, and the next year about as often. We

341 were out there every day or two.

Q. Do you know about the timber being cut off of these premises?

A. Yes, sir; we made an arrangement with Mr. Doll to have the streets and alleys opened, and afterwards we hired him to cut the timber off.

Q. For whom were you acting when you employed him to do that?

A. For James M. Woolworth.

Q. At the time you became acquainted with the premises, and from thence during that summer, were there any buildings on those premises?

A. No, sir; up near the west line there was an old cow-shed; it was dilapidated and looked as if it had not been used for some time.

Q. When did you see that shed first?

A. Well, I should think it was along near when we first commenced to go out there, in March or April, to tend to business there.

Q. Describe that building.

A. Well, as near as I can remember, it had been built some time there for a cow-shed, and had posts up and down and had been covered with hay or straw, but when we first saw it it was not in use, but it was — tumbled-down condition, and was so much in the street we had to pull it away so we could drive through there.

Q. When did you first see it?

A. I must have seen it the first time I was out there. I think I was out there in February first.

Q. When did you have it pulled down?

342 A. Just after we had it surveyed; that was along in April or about in May, and I had it pulled down. It was when I was first out there. I had it pulled out of the way—that is, enough of it so we could get through.

Q. Will you state where on these premises that house was located?

A. Well, as near as I can remember, it was located close to the south line of the ground. There was a fence between the two lots, and came right up to it on the south side. It was right near the street running north and south, the first street there. I could tell by a map. It was on the hill, on the crown, near the crown of the hill, and right close to this wire fence that used to be there.

Q. Was there a wire fence there at that time?

A. There had been a wire fence there, and there were some of the wires there yet, but I think the fence was not up.

Q. Was it on the first or second ridge as you go east from the poor farm?

A. It was on the first ridge.

Q. State its location with reference to the timber.

A. Well, there was some timber near it, right close to it. We had some timber cut off for stakes to put out in the street right by it. The timber was not *w*uite as heavy there as it was in some places, but we had to cut it away.

Q. Which slope of the ridge was it on, the west or east slope?

A. If I had a map I think I could tell exactly; but without a map I could hardly remember; but it strikes me it was on or pretty near the crown of the hill, but it may have been a little east of the crown of the hill. I cannot remember whether it was on the

343 west or the east, but it strikes me it was on the crown of the hill.

Q. State whether or not there was any other building on that tract.

A. There was no building of any kind on the tract or that piece of ground anywhere.

Q. From the time you came to know it, for, say, three years afterwards, state what buildings were on that tract.

A. Well, there was somebody put up a shanty on the east line of it, and I went to see about it. I went and saw you myself about it,

and I think you allowed him to stay there. I know we did not know anything about by what right he was there, and I went and saw you and you told me he could stay there.

Q. State whether or not there was any building on the tract than those which you have spoken of.

A. No, sir; there was nothing else there up to that time.

Q. State whether or not this shed was a habitable shed or not.

A. No, sir; it was not habitable for cattle. It was just a wreck.

Cross-examination.

By Mr. COVELL:

Q. When was the first you saw this piece of ground?

A. It was in the winter of 1883. I think, perhaps, along in February or March when we first obtained the agency for it.

Q. You do not know anything about the condition of the land before that as to buildings?

A. No, sir; I never was out on it to look at it till then.

Q. You spoke of there being a building over towards the east line. How near the east line of the premises in controversy?

344 A. If I remember right, it was not a great ways.

Q. What kind of a building was it?

A. I hardly remember now what it was made of.

Q. What kind of roof had it on?

A. I do not know.

Q. How many times did you see it there?

A. I could not tell you. Of course, I saw it every time I drove out there.

Q. Was there any other building there than the shanty you speak of?

A. No, sir.

Q. Is it not a fact that there was a barn close by?

A. There may have been poles put up for a barn.

Q. Some sort of a building for a stable?

A. It is possible; I don't remember.

Q. Who lived in that house?

A. I don't know that I ever knew his name. I think his name was Murphy, though I am not sure.

Q. Do you know a man named Murphy?

A. I know several of that name.

Q. Well, do you know a man named Murphy that you called Murphy that you think lived in that house?

A. No, sir; I do not know that I would know him if I would see him now.

Q. Don't you know there was a man named Upton that lived in that house near the southeast corner of these premises?

A. No, sir.

Q. Do you know of there being a house there prior to the year 1883, near the southeast corner of these premises?

345 A. Well, I did not know the ground prior to 1883, but if

there had been a house there there would be some signs of it, and there was no sign of it.

Q. Was there a fence built near where Poppleton avenue now is when you first saw these premises?

A. There might have been a fence, but it was trampled down badly if there was. I remember of some wires lying near this old cow-shed I spoke of.

Q. Don't you remember of there being posts there and wires attached to them along the south line of the tract over near where Poppleton avenue is now situated?

A. I don't remember of anything calling my attention to it.

Q. But there was a fence on the east line, was there not?

A. No, sir; there was nothing on the east line and no sign of a fence.

Q. When you first saw it?

A. No, sir.

Q. Nor afterwards?

A. No, sir; but there may be now.

Q. Well, afterwards, say up to 1888 or 1889.

A. I don't really remember; I paid so little attention to it. There was nothing there while we had anything to do with the property.

Q. When you went out there the first time and during the times you were out there was there any part of it cleared west of the top of that ridge you mentioned?

A. There was no timber on the west block of it.

Q. Was there on the west slope of that ridge?

A. There was a little timber on there. We had some
346 cut out of there. On the west edge there was no timber there—that was open prairie—but on the hill there was some timber.

Q. Upon the west slope of that hill, west of the crest of the ridge, was there anything grubbed out or cleared out of the timber there?

A. No, sir.

Q. It was not at all?

A. No, sir.

Q. You do not know whether there had been a house close to that cow stable or not?

A. There was no signs of one there. It was timber and brush as high as a horse's head there.

Q. And this stable you mention was all overgrown with brush?

A. The brush had grown up all around it.

Q. And there was no clearing around it?

A. No, sir; it looked as if — had not been used for a great while.

Q. You do not know anything about this man Murphy's character?

A. No, sir; and I do not know that was his name, but I think it was.

Q. Did you ever hear of a man of the name of Murphy having stolen one of Griffin's horses?

A. No, sir.

Q. Did you see this man Murphy on the stand this morning?

A. No, sir.

Q. You did not know him?

A. I did not see him.

Q. If you were to see the man you call Murphy that you think lived in that house towards the southeast corner of the
347 premises would you know him?

A. No, sir.

Q. At the time you say you hired Mr. Doll to cut the timber off of these premises you knew that Allen Root claimed to be the owner of the premises, did you not?

A. No, sir; I never had heard of Root.

Q. Is it not a fact that at the time you were having this timber cut off you knew these premises belonged to Mr. Root under and by virtue of a deed to the premises from the former owners?

A. No, sir; I did not know there was such a man in existence.

Q. Were you out there when the wood was being cut off?

A. Yes, sir; almost every day.

Q. Is it not a fact that while the wood was being cut off you were informed by Theodore Gallagher that Allen Root claimed to be the owner of these premises, and whatever wood was cut off of there would have to be settled for?

A. No, sir; I never saw Gallagher on the ground in my life. I never had a word with Gallagher about that property till about a year and a half ago in front of our office. I never saw him on the premises, and I never had a word of conversation with him in regard to them or anything else.

GEO. C. AMES.

(Excused.)

348 GEORGE W. AMES, a witness of lawful age, being by me first duly examined, cautioned, and solemnly sworn, deposeth and sayeth as follows:

Examined by Mr. WOOLWORTH:

Q. What is your name, age, occupation, and place of residence?

A. George W. Ames; real-estate agent; 34 years, and reside in Omaha, Nebraska.

Q. How long have you lived in Omaha?

A. I have lived here since the winter of 1881 and 1882. I came here in October, 1881.

Q. How long have you been engaged in the business of a real-estate agent?

A. Practically from the time I came here—within three months of that time.

Q. Are you acquainted with the premises in question, being the premises known as Oakhurst?

A. Yes, sir.

Q. How long have you know- those premises?

A. Well, I have known that ground very thoroughly since the winter of 1883, perhaps the fall of 1882, but certainly since the winter of 1883.

Q. How come you to become acquainted with them at that time?

A. I was the agent for the laying off of the ground into lots and for the sale of them, and I often used to go out there on that account.

Q. Who were you agent for?

A. I was agent for James M. Woolworth.

Q. How early in 1883 did you first go over the grounds?

349 A. Well, I think it must have been in February or March. It was early in the spring, and it was when the roads were bad. I remember that.

Q. What was the occasion of your going over it?

A. I went over it with Mr. Woolworth. He was about to select the grounds for Brownell hall that he proposed to give for the building of Brownell hall, and we walked all over it. In fact you could not go any other way.

Q. State whether or not you went through the timber.

A. Yes, sir; we — through all the grounds. We started in at the east end and went through the property, across the property, at least once, and I do not know but twice, and examined it as thoroughly as we could.

Q. Did you find any buildings on the premises?

A. No, sir; we did not find any building that we could call a building.

Q. State what you did find.

A. There was an old, dilapidated cow-shed. I should think it was a cow-shed. It was poles, and the top of it was covered with straw in a kind of a thatch, and it was very old. It appeared to be an old, dilapidated cow-shed.

Q. State whether or not you could see that cow-shed from any of the streets around the premises.

A. I don't think you could. I think it was so situated that you would not see it till you was upon it.

Q. Where was it situated?

A. I think it was upon the edge of the first ravine east of the street that is west of the land. I think it was on the slope to that ravine—the slope sloping from the east to the west.

350 Q. Was that on the first or second ridge as you go east from the poor farm?

A. That would be in the first gully or first draw there.

Q. Was it east or west of that gully?

A. I think it would be east of the gully, on the west slope of that draw.

Q. How near was it to the south boundary of the premises?

A. Well, I cannot say, but it was very near.

Q. State with reference to the timber; was it out of the timber?

A. Yes, sir; I think it was within the edge of the timber.

Q. How was it about the undergrowth?

A. It was thick. It was in very bad shape, and when they went to survey it out they had a great deal of trouble running the lines.

Q. Who did you employ to cut it out?

A. Mr. House; I forget his initials.

Q. Was it the county surveyor that cut out the timber?

A. He was surveying it. He said it was a very difficult undertaking on account of that underbrush.

Q. State whether or not you had the timber cut off.

A. Yes, sir; but we first had the streets and alleys cut out.

Q. When did you have that done?

A. Well, that was done, I think, some time in 1883 and right along after that. There was interval between cutting out the streets and alleys and the rest of it.

Q. Who did the work?

A. I think that Mr. Doll cut the timber out.

Q. What is Mr. Doll's first name?

351 A. Well, let me see—August Doll.

Q. Who did you employ him to do it for?

A. For J. M. Woolworth. We did everything as Mr. Woolworth's agents, turned the monies over to him, and rendered accounts to him of everything we done.

Q. Was there any other building on these premises except this shed you speak of?

A. No, sir; there was not.

Q. Was there at any time during the year 1883?

A. Not to my knowledge.

Q. How frequently were you on the premises in that year?

A. It would be hard to say. We were selling the land and were advertising it very heavily. It would be very hard to say how frequently we were there, but we were there very frequently, perhaps in some months a dozen times, and perhaps some months more than that.

Q. What did you do in the way of advertising it for sale?

A. We advertised it quite extensively.

Q. Did you sell any of the lots?

A. Yes, sir; we sold quite a number of lots.

Q. Did you ever see Allen Root on those premises?

A. I don't know him, sir. I never saw anybody I knew by the name of Root there. In fact, I do not know him now.

Q. State whether you ever had any notice from anybody of an interest adverse to your principal in those premises?

A. Never; not a word. I never had any notice in any way, shape, or manner. I did not know anything about it—that is to say, during that time.

Q. When did you first hear of such an adverse interest?

352 A. The first time I heard of it was about the time I drove to Oakhurst and noticed a house being built there, and I aasked what it meant, and the gentleman I asked did not know, but he told me that somebody had built the ho-se there and he did not know why, and then I heard there was some controversy about it. That is all I know about it.

Cross-examination.

By G. W. COVELL:

Q. What did you do with the wood that was cu- off of those premises?

A. Well, I don't know. We sold it. I don't know anything else we did with it.

Q. How much did you pay for cutting the wood off?

A. I don't remember that. My recollection is that a part of the wood that we cut off we gave to the parties that cut it, but I cannot recollect. We were doing a good deal of business in those days, and those we-e things I did not charge my mind wi-h; but whatever we agreed to do with it, we did. I think there was part of it sold.

Q. Who did you employ to cut the wood off?

A. I think we employed Mr. Doll. I have tho-ght since I sat down here that a part of that wood was sold to a man named Nelson, a Swede, but I don't know. I know we did not pay it all to Doll, but we got some money, and that money was accounted for to Mr. Woolworth.

Q. Is it not a fact that all the wood that was cut off by Doll was taken by him for cutting it off?

353 A. I say it is possible. We paid him for his labor, and we may have told him if he cut off this wood we will let you have it; but subsequently there was another agreement.

Q. Did Doll cut this wood off?

A. Yes, sir.

Q. Is it not a fact that Doll cut off all the timber that was on those premises, and that he cut it for the wood that he got out of it?

A. No, sir.

Q. Do you remember of seeing a house anywhere else on these premises at any time after 1883?

A. No. Do you mean lately?

Q. I mean up to 1887.

A. No; I don't think I did. I do remember of a house that I found down there upon our ground, as we called it, and I stopped and asked the man what he was doing there, and he said he did not know who owned the land, and he said he had set the house there because he did not know who owned the land; and I told him if he did not get permission to stay we would have to put him off, and I understood he got permission.

Q. You did not know that man, did you?

A. I don't think I would know him, but I know if he had not had permission we would have put him off.

Q. Did he have permission from you?

A. No, sir.

Q. And if he had any other permission, you do not know anything about it except hearsay?

A. I know nothing about any arrangement; but that was not very long ago.

Q. Whereabouts was that house situated with reference to
354 these premises—on what part of it?
A. The cow-shed?
Q. No; this last house you mention.
A. I cannot remember. I think it was a little east of the center line of that ground.
Q. Was it up on the east side of the ridge?
Q. Yes, sir; it was east of this old cow-shed.
Q. Was it east—was it on the east side of that ridge you mentioned as being east of the shed?
A. I think it was pretty near the east line of the grounds.
Q. You never saw the premises prior to the winter of 1883?
A. Yes, sir; I saw them.
Q. Did you go over them?
A. No, sir; I don't think I ever did before that time, but I had been on the edges of it.
Q. But you had not been over the premises to examine them prior to that time?
A. No, sir; not carefully.

GEO. W. AMES.

(Excused.)

JOHN A. MARSH, a witness of lawful age, being by me first duly examined, cautioned, and solemnly sworn, deposeth and sayeth as follows:

Examined by Mr. WOOLWORTH:

Q. This is the suit of James M. Woolworth against Allen Root. Are you the gentleman who testified in this case once before?
A. Yes, sir.
Q. Who got you to come here and testify?
355 A. Mr. Gallagher.
Q. Theodore Gall-gher?
A. Yes, sir.

Cross-examination.

By G. W. COVELL:

Q. You were subpœnaed to come there?
A. Yes, sir.
Q. And paid your fees?
A. Yes, sir.
Q. Two dollars?
A. Yes, sir.
Q. And you came after being subpœnaed as a witness?
A. Yes, sir.
Q. And only in that way?
A. Yes, sir.
Q. And you gave your testimony after having been regularly subpœnaed?
A. Yes, sir.

(Excused.)

356 FRANK MURPHY, a witness of lawful age, being by me first duly examined, cautioned, and solemnly sworn, deposeth and sayeth as follows:

Examined by Mr. WOOLWORTH:

Q. State your name, age, place of residence, and occupation.

A. My name is Frank Murphy; I am 17 years old; am a common laborer and live on 27th and Hickory, 1425 South 27th street.

Q. What relation are you to the Frank Murphy who was on the stand this forenoon?

A. The man that lived up on the ground there?

Q. Yes, sir.

A. He is my father.

Q. When did you go to live on these premises?

A. I went there about a week or ten days before Christmas.

Q. Of what year?

A. 1886, I believe it was.

Q. How long did you live there?

A. I lived there about 15 or 16 months. I do not remember just how long.

Q. Where was the house that you lived in on the grounds?

A. It stood on the grounds and on the street both, I believe, at first, and then it was moved back about 100 yards north.

Q. How much of a house was it?

A. I cannot say. I think it was about 16 by 24. It was a shanty.

Q. Was there any stable there?

A. Yes, sir; we had a stable there—a stable for seven horses after we moved back from the ditch. It was only for four at the first.

357 Q. What was your father's business?

A. He was teaming around town.

Q. Were those his horses?

A. Yes, sir.

Q. What became of the house when you left there?

A. They was living in the house when I left there, but they sold it afterwards and it was taken away; I went back to the bus again.

Q. Was there any other house on the premises while you lived there?

A. I don't believe there was, but I would not say for certain.

Q. Could you see all over it from your house?

A. We could see all of it except the next cañon. There was a hill between us and that.

Q. Did you go over into that cañon?

A. Yes, sir; I often went over there to catch the horses when they got loose.

Q. Did you see any house there?

A. No, sir; there was a house on the hill, but I don't think it was on that piece of property.

Q. Where was that house you say was on the hill?

A. It was north of us and over west o- further on that next hill.

It was over the hill there; it must have been about 35th street, I guess.

Q. On which side of Poppleton avenue?

A. On the north side.

Q. Was there anybody living in it?

A. Yes, sir; I think there was, but I never was over to the
358 house, but I think there was from the looks of things round there.

Q. How long was that house there?

A. It was there before I went there, and I guess it is there yet.

Q. You think it is there yet?

A. I guess it is, but I have not been over there since.

Cross-examination.

By G. W. COVELL:

Q. What time in the year do you say it was when you went there?

A. About a week or 10 days before Christmas. The folks were there before I went there.

Q. Of what year?

A. 1886, I believe it was.

Q. How long did you live there?

A. 15 or 16 months, and then I went back to the bus.

Q. How far east of the first ravine that there is on the premises in controversy was that house situated that you lived in?

A. I do not know; it may have been 75 yards. I expect it was probably that.

Q. It was not situated near that first deep ravine?

A. No, sir; it was not near that. The stable was near that hill.

Q. And the house was pretty near the southeast corner of the premises?

A. I think it was about 100 yards from the east line and about a hundred from the south line, if I am not mistaken.

Q. What kind of a shanty was it?

A. It was just a shanty of a house with the roof sloping one way, and about 16 by 24.

359 Q. What kind of a roof did it have on it?

A. A kind of a tar-paper roof with paint on. They called it a patent roof.

Q. Did the roof on the house resemble the top of a steamboat somewhat?

A. I do not know as it did. It was a kind of a tar-paper roof painted red with these tacks in it.

Q. How far from the house was the stable that you mention?

A. I do not know; about 50 yards, I guess.

Q. Which way?

A. The stable was northwest of the house.

Q. How come you to live on that place?

A. I do not know.

Q. You just simply squatted down there, did you?

A. I do not know; the house was already there. I was driving bus before I went there.

Q. It was built before you went there?

A. It was built before I went there.

Q. Is the Frank Murphy who was on the witness stand this morning your father?

A. Yes, sir.

Q. And you say you was living with him?

A. Yes, sir.

Q. And while you were living there with him did your father have any trouble with a man named Griffin with respect to any horses?

A. He got some horses of Mr. Griffin.

Q. Did he have difficulty about them?

A. Not that I know of. He bought the horses of him and
360 sold them back to him is the way I understood it.

Q. Are you sure he bought all the horses he got of Griffin?

A. Yes, sir; that is the way I understand it.

Q. And you did not know of any difficulty between the two parties?

A. No, sir.

Q. Do you know Albert E. Griffin?

A. I know him when I see him.

Q. Do you know Joel A. Griffin?

A. I know him when I see him. He was inspector on the paving, I believe.

Q. Do you know both of the Griffins?

A. Yes, sir; I know them when I see them, but I am not acquainted with them?

Q. How came you to be a witness here?

A. This man came up here after me.

Q. This man?

A. Yes, sir.

Q. What is his name?

A. I do not know.

Q. When did he first come after you?

A. The first I saw of him was to-day.

Q. Who sent him there?

A. I do not know.

Q. Were you paid any money for coming here to-day?

A. No, sir.

Q. What did this man first say to you?

A. He said he wanted me to come down and swear we lived on the ground.

361 Q. Who did he say wanted you to swear to this?

A. He did not say.

Q. Were you subpœnaed?

A. No, sir.

Q. You c-me voluntarily?

A. Yes, sir; I did not want to come.

Q. How does it happen that you came if you did not want to?

A. Because they wanted me, I suppose, and I did not have any work to do this afternoon.

Q. What did he promise to give you?

A. He did not promise me anything.

Q. What did he say his business was?

A. He did not say.

Q. Is to-day the first time you saw this gentleman?

A. I saw him out here at the house firs- one evening before.

Q. When was it?

A. I do not know.

Q. Was that the time he came after your father to come as a witness?

A. I believe it was, but I did not speak to him.

Q. This other man, have you seen him before to-day? Pinneo is his name.

A. I do not know as I did.

Q. Did he not go after you as a witness?

A. No, sir.

Q. But this other man did?

A. Yes, sir.

Q. Was this man at your father's house before four weeks ago?

362 A. I do not know.

Q. How many times has he been there?

A. I never saw him there but once.

Q. Did you hear any conversation between your father and him?

A. No, sir.

Q. How far away were you when they were talking?

A. I was off at the next house.

Q. How far is the next house from where he and your father were talking?

A. I do not know.

Q. About how far?

A. It is just across one lot.

Q. And you do not know what was said between them?

A. No, sir.

Q. Did he go there three or four times for your father?

A. I do not know. I only saw him once.

Q. You did not see him when he came there before for your father?

A. No, sir.

Q. Has anybody else been there to talk with you or your father about being witnesses here?

A. Nobody has been there to talk to me.

Q. And you came here at this man's solicitation without being subpœnaed and as a voluntary witness?

A. Yes, sir.

FRANK MURPHY.

(Excused.)

363 JULY 23RD, 1889.

HIRAM H. AKIN, a witness of lawful age, being by me first duly cautioned, examined, and solemnly sworn, deposeth and sayeth as follows:

Examined by A. J. POPPLETON:

Q. Please state your name, age, present place of residence, and occupation.

A. My name is Hiram H. Akin; occupation is a farmer; my present place of residence is Madison county, Arkansas.

Q. Have you ever lived in Omaha?

A. Yes, sir.

Q. When?

A. From the fall of 1879 to the spring of 1883.

Q. From what place or country did you emigrate to Omaha?

A. From Nova Scotia.

Q. What business did you follow while you was in Omaha?

A. Blacksmithing.

Q. Do you know the land in controversy in this case, being the 17 and one-half acres known as Oakhurst, and south of Leavenworth street and north of Poppleton avenue?

A. Yes, sir; I am acquainted with that tract.

Q. When did you first see it?

A. I first saw it in the spring of 1882.

Q. Did you ever live on that tract?

A. No, sir.

Q. Did you live in that vicinity?

A. I lived right south of Poppleton avenue.

Q. State as near as you can how far south of Poppleton avenue.

364 A. I should judge from 10 to 15 feet to the edge of the cut there in the avenue to show where my house stood—to the north side of my house.

Q. State now in your own way when and how you came to go upon that land.

A. Well, I went upon that land by permission of Gen. O'Brien. I heard that he had a piece of land he wanted somebody to live on, to hold possession of, and I went to see him and he gave me liberty to move on and put my house there, and I done so.

Q. Do you know whether General O'Brien is now living or dead?

—. I have heard he is dead.

Q. State about the — you entered upon this land.

—. Well, it would be, I think, in April of 1882, but I am not certain.

Q. Are you a married man?

A. Yes, sir.

Q. With children?

A. Yes, sir.

Q. What did you do first?

A. The first I done was to put a house on it.

Q. What did you do next?

A. I broke out the land next.

Q. If you raised a crop on that land that year state what it was.

A. Corn, and I had some little garden.

Q. Tell what kind of a house you had there.

A. It was just a board shanty with a sloping roof—that is, the roof sloped all one way.

Q. About how large was it?

365 A. I cannot give the size of the house, but I think, before I tore it down to move it there, I think it was 30 feet long by about 15 feet in width, as near as my recollection serves me, but I shortened it somewhat when I put it up. I did not put it up the same size as it was before, but I do not recollect how large it was.

Q. What did you do in the way of fencing?

A. Why, I put a fence up—a barb fence. I put a barb fence around it of two strings of wire and 2 by 4 posts.

Q. Did you ever build any house or any structure of any description north of Poppleton avenue and on the tract known as Oakhurst—the tract in controversy here?

A. I built a sort of a stable there.

Q. Locate that stable as near as you can and tell what kind of a structure it was.

A. It was just of poles and hay, and it was a little mite northeast of the house—in a northeast direction from the house; a very little east and north.

Q. How far from the north line of Poppleton avenue as now graded?

A. But a few feet.

Q. During the time that you occupied this house were you familiar with the tract in dispute?

A. Yes, sir—that is, I crossed it every day going to my work, back and forth.

Q. How did you reach town from your house on the O'Brien tract when you travelled on foot?

A. I went right down by the stable, just a little east of where the old stable stood, and went right through the woods right
366 on to the avenue on the other side.

Q. In doing so did you or did you not cross the tract in controversy?

A. Certainly; I went right across it.

Q. Did you become acquainted with the western portion of the tract?

A. On the western portion there was a piece of prairie there that I used to graze my horses on.

Q. On that piece of land known as Oakhurst, while you lived there, state whether there was any person occupied it or if there was any building upon it except the stable you speak of.

A. None that I ever saw, and if there had been any I think I would have seen it.

Q. When did you move away from there?

A. In the spring of 1883; March, 1883.

Q. Where did you go then?

A. I went to Brownville.
Q. In this State?
A. In southeastern Nebraska.
Q. How long did you remain there?
A. I remained there about six years, I guess; up till last fall, at all events.
Q. And then you went where?
A. Then I went to Arkansas, where I am living at present.
Q. You say you were a blacksmith by trade?
A. Yes, sir.
Q. State whether or not you worked at your trade when you were here in Omaha.
367 A. I worked at my trade all the time I was here.
Q. And including the time you were on th-s land?
A. Yes, sir; but sometimes I worked a day on the land now and again.
Q. Who did you work for?
A. Drexel and Knight.
Q. Fred. Drexel?
A. Yes, sir.
Q. What other people did you have business transactions with while you were here?
A. There were several. I do not recollect them all—with Rasmussen. They lived there north of that tract. We got our supply of milk from him, and I was back and forth to get water there and so forth.
Q. Did you know Theodore Gallagher, the man who has been a witness in this case?
A. Yes, sir.
Q. Where did he live while you were occupying this ground?
A. I cannot name the street, but he lived out towards the avenue.
Q. Towards what avenue?
A. St. Mary's. He did not live on it, though. What was the name of that street that run by the Rasmussen place there?
Q. Leavenworth street.
A. Was that it? It was the one that run north of Rasmussen's.
Q. Are you referring to the street running along north of Oakhurst?
A. Yes, sir.
Q. That is Pacific.
368 A. Well, that is the street he lived on. He lived on the corner, when I first made his acquaintance, of the first street when you come up on the top of the hill coming this way to town and after you get by that tract of land. He lived right there on the corner.
Q. When you went away, what did you do with the house and fence?
A. I sold them to Mr. Gallagher.
Q. What Mr. Gallagher?

A. Theodore Gallagher.

Q. Do you know how much you got for them?

A. I think it was for $65.

Q. Did you know Allen Root?

A. No, sir.

Q. Did you ever know him or hear of him while you was living on the O'Brien land?

A. Yes, sir; I have heard of him. I heard of him as being connected with the Farmers' Alliance. I also had him pointed out to me on the street. That is the only time I ever saw him to know him.

Q. Do you know whether this old gentleman sitting there is Allen Root or not?

A. No, sir; I do not.

Q. State whether you ever had any conversation or intercourse with Allen Root, or any person or persons purporting to represent him, in respect to the occupancy of this Oakhurst property.

A. Not any.

Q. Or to the land which you occupied when you lived there?

A. No, sir.

369 Q. State whether or not you made any arrangement or had any contract of any description with anybody except General O'Brien about occupying that land.

A. I had not. General O'Brien told me that I might occupy it, but that Theodore Gallagher held a lease on it, but he said he would see Mr. Gallagher, but for me to go ahead and build on it, and I done so.

Q. Have you been upon that land since you came back?

A. Yes, sir.

Q. Is that house standing now?

A. No, sir.

Q. Is the fence standing?

A. A part of it is standing and a part of it is lying down there.

Q. Will you state how you located the house and how you located the barways that were in the fence near the house when you went there?

A. Yes, sir. I had a barway just a little west of the house and I found that in the old fence that was lying there, and the gap was filled up with baling wire and most of the gap where the shanty stood was filled in with baling wire.

Q. State whether or not the shanty or house in which you lived formed a part of the fence.

A. Yes, sir; it formed a part of the fence. The north side of the house formed a part of the fence and the fence came up to each corner of it.

Q. What fences were there upon the tract in controversy or across the tract when you lived there on the O'Brien land?

370 A. It was not fenced—that is, on the south side there was no fence; only a part of one. Then the fence I made would put a fence on the south side of it between it and the

O'Brien land. On the north there was an old board fence a part of the way.

Q. And that was all there was?

A. That is all that I know of.

Q. Did you know while you lived there a man by the name of Pierce?

A. Yes, sir.

Q. What was he doing?

A. He was superintendent of the poor farm at that time.

Q. Did you ever know any other man by the name of Pierce living there or in that vicinity?

A. No, sir.

Q. State whether or not you had anything to do with Pierce in acquiring the possession of this O'Brien land and house.

A. Not at all; not a thing.

Q. State whether or not any one of the name of Pierce, to your knowledge, ever occupied the shanty which you put up there.

A. Not to my knowledge. I know they did not.

Q. State whether or not Theodore Gallagher assumed or pretended on behalf of Allen Root, the defendant in this case, to give you permission or authority to do anything—to live upon or to do anything with Oakhurst.

A. I never heard Mr. Root's name mentioned in the transaction at all.

Q. Well, did Mr. Gallagher ever propose to allow you to occupy Oakhurst and build a house there?

A. No, sir; he never did.

371 Q. Do you know where Mr. Root's house stands—the house that he has built within the last year?

A. Why, I saw it yesterday; the house was said to be Root's.

Q. Where is that wit- reference to the house you occupied? What direction is it from the spot where your house stood?

A. I guess it is a trifle west and about 150 feet north, I judge. It loo-ed so.

Q. It was a little northwest, then?

A. A trifle.

Cross-examination.

By G. W. COVELL:

Q. Where do you say you live at the present time?

A. In Madison county, Arkansas.

Q. How came you to be here as a witness? Were you subpœnaed?

A. Mr. Pinneo there came and got me to come here as a witness.

Q. He is a detective?

A. Yes, sir.

Q. When did he find you first?

A. Last Friday morning.

Q. What compensation, if any, have you received for coming here?

A. My expenses and $2.00 a day and my board.
Q. Was there any service of any subpœna made upon you?
A. No, sir.
Q. By any officer or anybody?
A. No, sir.
Q. Then, you come as a witness for the compensation he agreed to give you?
372 A. Yes, sir.
Q. Then, you are a voluntary witness?
A. Yes, sir.
Q. Do you know R. J. Colgen?
A. I knew a man that lived right east of that piece of land that I was on, but we called him Colligan; probably that is the same man. I do not know what his initials were.
Q. Do you know G. M. O'Brien?
A. I knew the old gentleman, General O'Brien, as he was called.
Q. Who went with you yesterday when you went to examine this piece of land in controversy that has been called Oakhurst on your direct testimony?
A. Mr. Pinneo.
Q. With whom have you been ever since you left the State of Arkansas to come here?
A. I have been with different ones. I have been with him, and then I left him at Lincoln and came up here on Sunday morning, and have been here ever since.
Q. What hotel have you been stopping at?
A. I have been staying at my brother's.
Q. Does your brother live in Omaha?
A. Yes, sir.
Q. You may state whether or not in April, 1882, you were present when R. J. Colligan, G. M. O'Brien, and Allen Root met and had a conversation and made an agreement with you with respect to the land in controversy in this case, together with other lands; and, if so, state about that time in the month of April, 1882, it was and where it occurred.
373 A. I do not know anything about it.
Q. Is it not a fact that somewhere from the 1st to the 15th of April, 1882—about, perhaps, the middle of April, 1882—you met George M. O'Brien, R. J. Colligan, and Allen Root at some point on the land then known as the O'Brien land and agreed with those parties to construct a house upon the land in controversy and hold and occupy the same for Allen Root, to take care of the timber on the place, and also to take care of the land then known as the O'Brien land in connection with this?
A. No, sir; there was never any such agreement or anything of the kind that I have any recollection of.
Q. Do you state it to be the truth that you never met George M. O'Brien, R. J. Colgen, and Allen Root together during the month of April, 1882, in which the subject of living upon and taking care of the land in controversy in this cause, as well as the O'Brien land, was talked over and agreed upon between you and they?

A. I have no recollection of any such meeting at all. We may possibly have met together, but I know there was no such talk about, no such an agreement for me to hold the land, and I have no recollection of any such a meeting at all; not any.

Q. Then you state positively you did not meet with those parties for that purpose?

A. I state positively I did not meet with them for that purpose.

Q. Do you state positively you had no conversation or arrangement with them in the presence of each other at or about the time named, and about going upon the land in controversy
374 in this act-on as well as the O'Brien land?

A. I have no recollection of any such meeting at all whatever, and I have no recollection of ever hearing Root's name mentioned to me in reference to the land in any way, shape, or manner.

Q. Is it not a fact you received permission from Allen Root to erect a house upon the land in controversy in this case and live upon it from the time that you went there until you left it?

A. No, sir; I never had permission from any such person.

Q. Is it not a fact that the house you lived in stood near the house now occupied by Allen Root upon the premises on controversy in this action?

A. It stood about as near as I have told you, and it stood on the O'Brien land, on the south side of the avenue.

Q. I believe you stated you were yesterday upon this tract of land and went over and examined it?

A. Not all of it.

Q. If so, did you notice some trees standing near to and little south of the house now occupied by Allen Root; and, if so, is it not a fact that the house you occupied stood between those trees, near to the house occupied by Allen Root and north of what is now known as Poppleton avenue?

A. No, sir.

Q. Whereabouts on that tract did the barn or stable you used for your stock while there stand?

A. It stood right on that hill there, right on the top of it, and just a few feet from where the avenue is now.

375 Q. In what direction from the avenue?

A. North of the avenue.

Q. What conversation, if any, did you have with Mr. Pinneo yesterday, out upon this land in controversy, with respect to the location of this you lived in?

A. Nothing, only what I have given here in testimony.

Q. Is it not a fact that on yesterday Mr. Pinneo directed your attention to a place on this tract where it was necessary that this house should be located for the purpose of testimony in this case, and is it not a fact that you have located that house in your testimony here in accordance with the suggestion made to you yesterday by Pinneo.

A. No, sir.

Q. Have you had any conversation with any other person than Pin-eo, and connected with this case, as to what your testimony w-uld be here to-day; and, if so, with whom?

A. I have had none at all, except with Mr. Poppleton; I talked with him a few minutes yesterday; about five minutes, I believe, I was in his office.

Q. In your direct testimony you stated you made a contract with General O'Brien as to occupying General O'Brien's land. Where were you when you made that contract?

A. I was living then just south of where the Omaha white lead works is, in that shanty that I tore down and moved there.

Q. You have not answered my question.

A. I thought you asked where I lived—where was I when I made that contract. I was out on that tract of land.

Q. Who was present?

A. B. F. Tuapp, General O'Brien, and myself.

376 Q. Where does B. F. Trapp live?

A. He lives now, I believe, in Kansas, but his son lives here, or one of them does.

Q. At what place was it on that land where you made this contract with General O'Brien?

A. I do not know just what spot it was.

Q. Was it in a structure or building on these premises?

A. No, sir; there was no structure or building there at that time.

Q. About what time of what month and of what year was it you made this contract?

A. It was in April, 1882, but I won't be certain as to the month.

Q. State whether or not there was any other person present than the men which you have named in your answer just previous to this.

A. Not that I recollect of.

Q. And you state that the place where the contract was made was not at any house, and that you did not meet at any house with the parties prior to making the contract?

A. Yes, sir; I do.

Q. You may state whether or not you had more than the one conversation relating to the contract; and, if so, where any other conversation occurred respecting it.

A. I do not recollect now that I had any more conversation with General O'Brien about it, but during the time I lived on there I talked with General O'Brien, I suppose, a 100 times.

Q. Now, you may state whether or not you had any contract with him other than a verbal contract.

A. None other than a verbal contract.

Q. There was no written contract?

377 A. There was no written contract.

Q. How far south of the house that is now occupied by Allen Root was it that your house stood?

A. Somewhere about 150 yards, I should judge, and a little east of his.

Q. Do you state positively that the house you lived in did not stand upon the ridge or hill near the center of the land in controversy and north of what is now known as Poppleton avenue?

A. Yes, sir; I am positive it did not stand there, but it stood near the western slope of the hill, on the O'Brien tract.

Q. While you were living out there did you notice a tract of 2 or 3 acres of land that had been grubbed out upon the land in controversy in this action; and, if so, where was it?

A. That had been grubbed out?

Q. Yes, sir; and put under cultivation.

A. I never noticed any that I know of, except on the west end there was a piece of prairie there.

Q. Up on the western slope of the hill to which your attention has been called, on the premises in controversy and east of the draw or gully which stands west of the house now occupied by Allen Root, is it not a fact that there were from 2 to 3 acres that had been grubbed out of the timber and underbrush on the land that had been put under cultivation?

A. West of the gully?

Q. East of the gully.

A. I could not tell you whether there was or not, but there
378 was none that I ever saw, to my knowledge.

Q. What were the surroundings of the house that you occupied while you lived out there?

A. There were no surroundings except a kind of a field on the south and the timber land on the north.

Q. How near to that house which you occupied was there any timber, trees, or underbrush on the north side of the house?

A. On the north side of the house, on the northeast corner of the house, the underbrush came up pretty close to the house—that is, plum underbrush, and there was some of it on the south side of the avenue yet, but right at the north of the house there — quite a little distance—I do not recollect how far—before you struck the brush there.

Q. What was done with your house, did you say, when you left it?

A. I sold it to Theodore Gallagher.

Q. What year was that?

A. That was in March, 1883.

Q. You may state whether you had a conversation or agreement with Theodore Gallagher by which you were to live upon and take care of the premises in controversy for Allen Root.

A. I never had any conversation with Theodore Gallagher about Allen Root; not a thing.

Redirect examination.

By A. J. POPPLETON:

Q. What caution did General O'Brien, when you built your house give you in respect to its location, if anything?

Defendant objects as immaterial.

379 A. He cautioned me to be careful and get the house on the prairie land and not to get over the line, onto that timber land.

Q. Which was that, his own or the Oakhurst land?

Defendant objects as immaterial.

A. Across the line the timber was the Oakhurst land and the prairie was the land he was claiming.

A. At the time you were there, state whether or not you were ever charged by anybody with any care, oversight, or control of the Root land.

A. No, sir; not at all.

(Excused.)

JOHN C. DREXEL, a witness of lawful age, being by me first duly examined, cautioned, and solemnly sworn, deposeth and sayeth as follows:

Examined by A. J. POPPLETON:

Q. Please state your age and occupation.

A. My age, did you say? I am 33 years old, and am an undertaker.

Q. How long have you lived in Omaha?

A. Pretty near 33 years.

Q. Do you know the man who has just been on the stand?

A. Yes, sir.

Q. When were you acquainted with him?

A. I think it was in 1881 or 1882; he worked for my father in the stone yard blacksmithing. I was book-keeper for my father.

Q. What was your father's occupation at that time?

380 A. He was a stone contractor.

Q. What kind of blacksmithing did he do for your father?

A. He sharpened the tools and done general blacksmithing.

Q. You say you were book-keeper and had charge of your father's books at that time?

A. Yes, sir.

Q. Do you know where the man lived?

A. I kno- where he lived a part of the time.

Q. Where?

A. He lived out near the poor farm.

Q. Do you know exactly where he lived, upon what tract of land, or do you simply know he lived out in that direction?

A. I h-d occasion once or twice to go out there after him, when we wanted him in the shop, but I could not place where the house was now, but from conversations with the man——

Defendant objected as hearsay.

Q. Were you out there at the house?

A. Yes, sir.

Q. Well, from your recollection of the location of the house and your knowledge of the locality, can you tell whether it was north or south of Poppleton avenue?

A. No, sir; I cannot.

Q. How long a time did you know the man?

A. I knew him about a year, I think. He worked down there while I was clerking down there.

Q. Will you state whether or not you recollect the location of the house with reference to any wire fence—whether the house stood inside of an enclosure with a wire fence or not?

A. No, sir; I do not recollect.

381 Q. But you are sure this is the same man who worked for your father and who lived in that direction?

A. Yes, sir.

(Excused.)

382 *Ex. b.*

$——. Treasurer's office, Douglas county, Nebraska. No. ——.

OMAHA, *March* 1, 1887.

Received of J. M. Woolworth one hundred and twenty-four $\frac{14}{100}$ dollars, in full of the following taxes for the year 1871 on the annexed property or real estate:

Part of section or name of town.	Section or lot.	Town or block.	Range or lot.	Acres or block.	Kind of tax.	Paid in cash.	In warrants.	Interest.	Total.
Beg. at N. W. cor. sec. 28, S. 8.05 chs., E. 20.10 chs., N. 9.20 chs., W. 20 chs.	28	15	13	.....	State gen'l fund	5			
					State sin'g fund	2			
					State sch'l	4			
					State nor'l school	1			
					Co'y gen'l fund	6			
					Co. special s'k'g fund	1			
					Co. sink'ng b'nd fund	1			
					Co. s'k'g R. R. b'd f'd	12			
					Co. s'k'g R. R. bg. b'd	6			
					R'd fund	42			
					Road and bridge	2			
					Poor fund	2			
					D't school	4			
					Poll				
					Advertis'g	.....	.....	.....	20
					Total	46 42	.....	77 52	124 14

Duplicate.

HENRY BOLLN, *Treasurer.*
JOHN GROVER, *Deputy.*

383 *Ex. a.*

$——. Treasurer's office, Douglas Co., Nebraska. No. 3586.

OMAHA, *Mar.* 1, 1887.

Received of J. M. Woolworth one hundred and sixty-four & $\frac{30}{100}$ dollars, in full of the following taxes for the year 1870 on the annexed property or real estate:

Part of section or name of town.	Section or lot.	Town or block.	Range or lot.	Acres or block.	Kind of tax.	Paid in cash.	In warrants.	Interest.	Total.
Beg. at N. W. cor of sec. 28, south 8.05 chains, east 20.10 chains, north 9.20 chains, west 20 chains.	28	15	13	.....	State gen'l fund	5 10			
					State sink'g fund	1 27			
					State school	5 10			
					State university	2 55			
					Co. general fund	7 65			
					Co. special sin. fund	2 55			
					Co. sin. bond fund	2 55			
					Co. sin. R. R. bond fund.	10 20			
					Road fund	32			
					Road and bridge	2 55			
					Poor fund	2 55			
					Dist. school	16 57			
					Poll				
					Dog				
					Advertising	.....	.....	.....	20
					Total	58 96	.....	105 14	164 30

(Duplicate.)

HENRY BOLLN, *Treasurer.*
JOHN GROVER, *Deputy.*

384 *Ex. c.*

$——. Treasurer's office, Douglas county, Nebraska. No. ——.

OMAHA, *March* 1, 1887.

Received of J. M. Woolworth forty-four and $\frac{60}{100}$ dollars, in full of the following taxes for the year 1866 on the annexed property or real estate:

Part of section or name of town.	Section or lot.	Town. or block.	Range or lot.	Acres or block.	Kind of tax.	Paid in cash.	In warrants.	Interest.	Total.
173¾ ac. in W. ½ N. W.	28	15	13	.....	State gen'l fund.....	1 34			
					State sink'g fund.....	81			
					State school	1 07			
					Co. road & bridge.....	3 70			
					Co. general fund.....	93			
					Co. sink'g fund.....	34			
					Land road tax				
					Poll tax.....	53			
					Poor fund.....	3 71			
					Dist. school.....	8			
					Court-house				
					Advertising.....	.....	.....	.....	20
					Total.....	13 58	.....	30 82	44 60

Duplicate.

HENRY BOLLN, *Treasurer.*
JOHN GROVER, *Deputy.*

385 *County Treasurer's Certificate of Tax Sale.*

No. —.

STATE OF NEBRASKA, } ss:
Douglas County, }

I, E. C. McShane, treasurer of the county of Douglas, in the State of Nebraska, do hereby certify that the following-described real estate in said county and State, to wit, tract in 28, 15, 13, 17 acres, was on the 11 day of October, A. D. 1873, duly sold by me in the manner provided by law, private sale, for the delinquent taxes for the year 1872 upon tract in 28, 15, 13, 17 acres, amounting to thirty-five $\frac{75}{100}$ dollars, including interest and penalty thereon and the costs allowed by law, to J. M. Woolworth for the said sum of thirty-five $\frac{75}{100}$ dollars, he being the highest and best bidder for the same; and I further certify that unless redemption is made of said real estate, in the manner provided by law, the said J. M. Woolworth, heirs or assigns, will be entitled to a deed therefor on and after the 11 day of October, A. D. 1875, on surrender of this certificate.

In witness whereof I have hereunto set my hand this 11th day of October, A. D. 1873.

E. C. McSHANE,
Treasurer Douglas Co., State of Nebraska.

[Written across face in red ink:] Sold for taxes at private sale after being offered at public sale.

[Written across face in black ink:] One-half of this is for the benefit of Mr. W. S. T. Morton, who owned one undivided half of the land. J. M. W.

386 *Ex. e.*

$——. Treasurer's office, Douglas Co., Nebraska. No. 3400.

OMAHA, —— 13, 187–.

Received of J. M. Woolworth thirty-three $\frac{57}{100}$ dollars, in full of the following taxes for the year 1872 on the annexed property or real estate:

Part of section or name of town.	Section or lot.	Town. or block.	Range or lot.	Acres or block.	Kind of tax.	Paid in cash.	In warrants.	Interest.	Total.
Beg. at N. W. cor. sec. 28th, 8.05 chs., S. 85° E. 20.10 chs., N. 9.70 chs., W. 20 chs. to beg.	28	15	13	17	State gen'l fund	3 82	.....	19	
					State sink'g fund	1 53	.....	8	
					State school	3 06	.....	15	
					State university	38	.....	2	
					Co. general fund	6 12	.....	31	
					Co. special sin. fund	76	.....	4	
					Co. sinking R. R. bond fund.	9 18	.....	46	
Sold for taxes at private sale.					Co. sin. R. R. b'dge bond.	4 59	.....	23	
					Road fund	42	.....	2	
					Road and bridge	1 53	.....	8	
					Poor fund	38	.....	2	
					Dist. school				
					Poll				
					Dog				
					Advertising	.....	.....	20	
					Total	31 77	.....	1 80	$33 57
					5 ¢	.....	.....	.....	1 68
					Cert.	.....	.....	.....	50
									35 75

Duplicate. E. C. McSHANE, *Treasurer.*
—— ——, *Deputy.*

387 *Ex. f.*

$——. Treasurer's office, Douglas county, Nebraska. No. ——.

OMAHA, *July 2d*, 1874.

Received of J. M. Woolworth one hundred thirty-five $\frac{69}{100}$ dollars, in full of the following taxes for the year 1873 on the annexed property or real estate:

Part of section or name of town.	Section or lot.	Town. or block.	Range or lot.	Acres or block.	Kind of tax.	Paid in cash.	In warrants.	Interest.	Total.
Tract in W. ½ N.W. ¼	28	15	13	17	State general fund	15 79	.....	32	
Omaha	5	151	.....	.....	State sink. fund	6 32	.....	13	
Sweezy's add'n	6	"	.....	.....	State school	12 64	.....	25	
	13	5	.....	.....	State university fund.	1 57	.....	3	
	14	5	.....	.....	State penitentiary	3 15	.....	6	
					County general fund	.....	25 24	50	
					Co. special sink'g fund.	3 15	.....	6	
Personalty.					Co. s'k'g R. R. bond fund.	37 92	.....	76	
					Co. s'k'g R. R. bridge bond.	18 96	.....	38	
					Road fund	42	.....	1	
					Road & bridge	3 15	.....	6	
					Poor fund	4 73	.....	9	
					Dist. school				
					Poll				
					Dog				
					Advertising				
					Total	107 80	25 24	2 65	135 69

Duplicate. (S'g'd) A. C. ALTHAUS, *Treasurer.*
—— ——, *Deputy.*

388 *Ex. g.*

$——. Office of county treasurer, Douglas county, Neb. No. ——.

OMAHA, *June* 19, 1875.

Received of J. M. Woolworth two hundred fifteen and $\frac{44}{100}$ dollars, in full of the following taxes for the year 1874 on the annexed property or real estate:

Part of section or name of town.	Section or lot.	Town. or block.	Range or lot.	Acres or block.	Kind of tax.	Paid in cash.	In warrants.	Interest.	Total.
Undi ¼ of S. W. N. E. ¼	10	15	13	.....	State general fund	23 63	.....	24	
" ¼ " S. ½ N. W. N. E. ¼	"	"	"	.....	State sinking fund	9 45	.....	9	
" ¼ N. 17¾ a. of W. ½ N. W. ¼	28	"	"	.....	State school fund	18 90	.....	19	
Omaha	5	51	.....	.....	State university fund.	2 36	.....	2	
Sweezy's add	6	51	.....	.....	State penitentiary	4 72	.....	5	
	13	5	.....	.....	County gen'l fund	47 26	.....	47	
	14	5	.....	.....	County spec'l sinking fund.	4 72	.....	5	
Personalty.					R. R. bond sinking fund.	42 53	.....	43	
					R. R. bridge b'd s'k'g f'd.	23 62	.....	24	
					Road & b'dge fund	9 45	.....	9	
					Poor fund	2 36	.....	2	
					Asylum	1 19	.....	1	
					Road	97	.....	1	
					Dist. school	20 15	.....	20	
					Poll	2 00	.....	2	
					Dog				
					Advertising				
					Total	213 31	.....	2 13	215 44

Duplicate.

A. C. ALTHAUS, *Treasurer.*
——, *Deputy.*

389 *Ex. h.*

$——. Office of county treasurer, Douglas county, Neb. No. 1012.

JULY 19, 1876.

Received of J. M. Woolworth one hundred forty-three & $\frac{68}{100}$ dollars, in full of the following taxes for the year 1875 on the annexed property or real estate:

Part of section or name of town.	Section or lot.	Town. or block.	Range or lot.	Acres or block.	Kind of tax.	Paid in cash.	In warrants.	Interest.	Total.
Und. ½ S. ½ N. W. N. E. ¼	10	15	13	.....	State gen'l fund	20 54	.....	41	
Und. ½ S. W. N. E. ¼	10	15	13	.....	State sink'g fund	5 13	.....	10	
Und. ½ N. 17¾ a. W. ½ N. W. ¼	28	15	13	.....	State school fund	5 14	.....	10	
Reed's 1st addition:									
1, 2, 3, and	4	5	.....	.....	State university fund	1 28	.....	3	
4, 5, 6, 7, and	8	6	.....	.....	State penitentiary	5 14	.....	10	
E. ½	12	6	.....	.....	Bond fund	51	.....	1	
W. ½	13	6	.....	.....	Co. general fund	28 29	.....	57	
					Co. sinking fund	2 57	.....	5	
Personalty.					R. R. bond sink'g fund.	20 54	.....	41	
					R. R. bridge b'd sin. f'd.	10 27	.....	21	
					Road and bridge	10 27	.....	21	
					Poor fund	2 57	.....	5	
					Asylum fund	64	.....	1	
					Road fund	97	.....	2	
					Dist. school	25 00	.....	50	
					Poll	2 00	.....	4	
					Dog				
					Advertising				
					Total	140 86	.....	2 82	143 68

Duplicate.

A. C. ALTHAUS, *Treasurer.*
——, *Deputy.*

390 *Ex. i.*

$——. Office of county treasurer, Douglas county, Neb. No. ——.

OMAHA, *July* 17, 1877.

Received of J. M. Woolworth one hundred thirty-one & $\frac{75}{100}$ dollars, in full of the following taxes for the year 1876 on the annexed property or real estate:

Part of section or name of town.	Section or lot.	Town. or block.	Range or lot.	Acres or block.	Kind of tax.	Paid in cash.	In warrants.	Interest.	Total.
Undivid. ⅛ of following tract: Beginning at N. W. corner of sec. 28, then S. 8.05 chs., thence S. 85° east 20.10 chs., thence N. 9.70 chs. and west 20 chs. to beginning, in N. W. N. W. ¼.	28	15	13	17¾	State general fund, 4..	21 74	.....	43	
					State sink'g fund, ¾..	4 08	.....	8	
					State school fund, 1...	5 44	.....	11	
					State university fund, ¼.	1 36	....	3	
					State penitentiary, 1..	5 43	.....	11	
					State bond fund, 1.10..	54	.....	1	13 72
Undivided ⅛ S. ½ N. W. N. E. ¼..	10	15	13	.....	Co. general fund, 5.....	27 17	.....	54	19 15
Undivided ½ S. W. N. E. ¾.....	10	15	13	.....	R. R. bond sink'g f'd, 4.	21 74	.....	43	49 10
Reed's 1st addition: 1, 2, 3, and.....	4	5	.....	.....	R. R. bridge b'd sin. f'd, 2.	10 87	.....	22	
4, 5, 6, 7, and.....	8	6	.....	.....	Bridge fund, 1 65-100..	8 97	.....	18	16 00
E. ½.....	12	6	.....	.....	Asylum fund, ¼.....	1 36	.....	3	15 00
W. ½.....	13	6	.....	.....	Road fund.....	97	....	2	2 00
					Dist. school.....	17 50	.....	35	2 00
					Poll.....	2 00	.....	4	12 20
					Dog.....				
					Advertising.....		Interest.		
					Total.....	129 17	.....	2 58	131 75

Duplicate. (S'g'd) A. C. ALTHAUS, *Treasurer.*
T. BUCK, *Deputy.*

391 *Ex. j.*

$——. Office of county treasurer, Douglas county, Neb. No. 2903.

APRIL 30TH, 1878.

Received of J. M. Woolworth one hundred fifty-four & $\frac{30}{100}$ dollars, in full of the following taxes for the year 1877 on the annexed property or real estate:

Part of section or name of town.	Section or lot.	Town. or block.	Range or lot.	Acres or block.	Kind of tax.	Paid in cash.	In warrants.	Interest.	Total.
Undivided ⅛ of fol. tract: Beginning at N. W. cor. of sec. 28, thence S. 8.05 chs., then S. 85° E. 20.1 chs., then N. 9.7 chs., and then W. 20 chs. to beginning, in N. W. N. W.	28	15	13	8.875	State general fund, 4..	29 36			
					State sink'g fund, ¾..	6 42			
					State school fund, 1...	7 34			
					State university fund, ¾.	2 75			
					Co. general fund, 6.....	44 04			
					R. R. bond sink'g f'd, 3½.	25 69	.....	.....	9
Omaha: 5 and.....	6	151	.....	.....	R. R. bridge b'd sin. f'd, 2½.	16 52*	.....	.....	44
Reed's add.: 1, 2, 3, and	4	5	.....	.....	Bridge fund, 2	14 68	.....	.....	12 80
4, 5, 6, 7, and.....	8	6	.....	.....	Dist. school.....	7 50	.....	.....	12 50
E. ½.....	12	6	.....	.....	Dog.....	.....	.....	.....	1 60
W. ½.....	13	6	.....	.....					1 60
Sweezy's add.: 13 and	14	5	.....	.....					3 20
Und. ½ S. ½ N. W. N. E	10	15	13	10					16 10
Und. ½ S. W. N. E	10	15	13	20					41 40
									12 10
					Advertising				
					Total.....	$154 30	.....	.....	$154 30

*Lot six has been paid. See receipt 912.

(Duplicate.) WM. F. HEINS, *Treasurer,*
By JOHN RUSH, *Deputy.*

392 *Ex. k.*

$——. Office of county treasurer, Douglas county, Neb. No. 2906.

OMAHA, *July* 28, 1879.

Received of —— —— — $\frac{}{100}$ dollars, in full of the following taxes for the year 1877 on the annexed property or real estate:

Part of section or name of town.	Section or lot.	Town. or block.	Range or lot.	Acres or block.	Kind of tax.	Paid in cash.	In warrants.	Interest.	Total.
Und. ¼ of 17¾ ac. tract in N.W. N.W	28	15	13	8.87½	State general fund, 4..	38 68	.....	77	
					State sink'g fund, ⅝..	8 47	.....	17	14 51
Und. ¼ S. ¼ N.W. N.E	10	15	13	10	State school fund, 1....	9 67	.....	19	17 15
Und. ¼ S. W. N. E.....	10	15	13	20	State university fund, ⅜	3 62	.....	7	44 10
Omaha.....	5	151	.....	.....	Co. general fund, 10...	96 70	.....	1 94	51 60
	6	"	.....	.....	Bond sink'g f'd, 5¼..	50 75	.....	1 02	43 00
Reed's add.: 1, 2, 38..	3	5	.....	.....	.....	.....	.....	.....	9 66
4, 5, 6, 7..	8	6	.....	.....	.....	.....	.....	.....	10 75
E. ½.....	12	6	.....	.....	Dist. school.....	7 50	.....	15	1 72
Personalty.....	.....	.....	.....	.....	Dog	.....	.....	.....	22 90
4 in 5 omitted. W. ½ 13 omitted.					Advertising.....				
Total	.....	.....	.....	.....	.....	215 39	.....	4 31	219 70

(Duplicate.)

WM. F. HEINS, *Treasurer.*
JOHN RUSH, *Deputy.*

393 *Ex. l.*

$——. Office of county treasurer, Douglas county, Neb. No. 4162.

OMAHA, NEB., *Dec'r* 7, 1881.

Received of J. M. Woolworth two hundred sixty-seven $\frac{20}{100}$ dollars, in full of the following taxes for the year 1880 on the annexed property or real estate:

Part of section or name of town.	Sec., or lot.	Town. or blk.	R'ng.	Acres.	Valuat'n.	Am't school tax.	Am't tax.	Interest.	Total.
									$ C.
S. ½ N. W. ¼.....	35	15	12	.....	480	4 80	.....	.....	14 16
N. ¼ S. W. ¼	"	"	"	.....	480	4 80	.....	.....	14 16
Und. ¼ S. ¼ N. W. N. E.....	10	15	13	.....	725	.....	.....	.....	14 14
Und. ¼ S. W. N. E.....	"	"	"	.....	1,850	21 97	.....	.....	58 05
Lot No. 8.....	22	15	13	1.37	2,500	.....	.....	.....	48 75
Deling, 59, 66, 70, & 71", 6.....	28	15	13	17.75	700	.....	.....	.....	13 65
Omaha.....	5	151	.....	.....	1,800	.....	.....	.....	35 10
	6	151	.....	.....	2,300	.....	.....	.....	44 85
Personalty.....	.....	.....	.....	.....	475	.....	.....	.....	10 27
							Int....	.....	14 77
Total.....	.....	.....	.....	.....	.....	.....	.....	.....	267 90

Duplicate.

WM. F. HEINS, *Treasurer.*
——, *Deputy.*

394 *Ex. m.*

$——. Office of county treasurer, Douglas county, Neb. No. 6864.

OMAHA, NEB., *Sept.* 30, 1882.

Received of James M. Woolworth three hundred ninety-seven & $\frac{58}{100}$ dollars, in full of the following taxes for the year 1881 on the annexed property or real estate:

Part of section or name of town.	Sec. or lot.	Town. or b'lk.	R'ng.	Acres.	Valuat'n.	School tax.	Lab'r.	Interest.	Amount of tax.	Total.
S. ½ N. W.	35	15	12	80	480	.....	.....	.....	.....	15 84
N. ½ S. W.	"	"	"	80	560	.....	.....	.....	.....	18 48
Und. ½ S. ½ N. W. N. E.	10	15	13	10	750	.....	.....	.....	.....	18
" " S. W. ¼ N. E.	"	"	"	20	1,900	.....	.....	.....	.....	39 90
Lot 8	22	15	13	1.37	7,000	.....	.....	.....	.....	147
" 6	28	"	"	17.55	700	.....	.....	.....	.....	14 70
Omaha	1	151	.....	.....	2,000	.....	.....	.....	.....	42 00
	6	"	.....	.....	2,300	.....	.....	.....	.....	48 30
Personalty			.....	.....	1,930	.....	.....	.....	.....	40 53
								Int.	.....	12 83
Total										397 58

(Duplicate.)

JOHN RUSH, *Treasurer.*
—— ——, *Deputy.*

395 *Ex. n.*

$——. Office of county treasurer, Douglas county, Neb. No. 5965.

OMAHA, NEB., *Aug.* 1, 1883.

Received of J. M. Woolworth four hundred twenty-two & $\frac{29}{100}$ dollars, in full of the following taxes for the year 1882 on the annexed property or real estate:

Part of section or name of town.	Sec. or lot.	Town. or b'lk.	R'ng.	Acres.	Valuat'n.	School tax.	Lab'r.	Interest.	Amount of tax.	Total.
										$ C.
Lot 6	28	15	13	17¾	1,775	.....	.....	.....	.....	30 82
Undi. ½ S. ½ N. W. N. E.	10	"	"	.....	1,000	4	.....	.....	.....	27
" S. W. N. E.	"	"	"	.....	2,000	.....	.....	.....	.....	46
Lot 8	22	"	"	1.37	7,300	.....	.....	.....	.....	167 90
Omaha	5	151	.....	.....	2,000	.....	.....	.....	.....	46
	6	"	.....	.....	2,300	.....	.....	.....	.....	52 90
Personalty	.....	.....	.....	.....	1,515	.....	.....	.....	.....	34 85
								Int.	.....	6 92
Total										422 39

Duplicate. (S'g'd)

JOHN RUSH, *Treasurer.*
—— ——, *Deputy.*

396 *Ex. o.*

$——. Office of county treasurer, Douglas county, Neb. No. 7857.

OMAHA, NEB., *Aug.* 1, 1884.

Received of J. M. Woolworth four hundred sixty-nine $\frac{37}{100}$ dollars, in full of the following taxes for the year 1883 on the annexed property or real estate:

Part of section or name of town.	Sec. or lot.	Town or blk.	R'ng.	Acres.	Valuat'n.	School tax.	Labor.	Interest.	Am't of tax.	Total.
						$ Cts.	$	$ Cts.	$ Cts.	$ Cts.
Lot 6	28	15	13	.....	2,500	.....	.....	.....	.....	59 69
Undi. ¼ S. ½ N. W. N. E.	10	"	"	.....	1,000	.....	.....	.....	.....	23 88
S. W. N. E.	"	"	"	.....	2,000	.....	.....	.....	.....	47 75
Lot 8	22	"	"	.....	7,000	.....	.....	.....	.....	167 12
Omaha	5	157	.....	.....	2,100	.....	.....	.....	.....	50 14
	6	"	.....	.....	2,400	.....	.....	.....	.....	57 30
Personalty	.....	.....	.....	.....	2,180	.....	.....	.....	.....	52 04
								Int.	.....	11 45
Total	.....	.....	.....	.....	.....	.....	.....	.....	.....	

(Duplicate.)

JOHN RUSH, *Treasurer.*
HENRY F. RHODES, *Deputy.*

397 *Ex. p.*

$——. Office of county treasurer, Douglas county, Neb. No. ——.

OMAHA, NEB., *Sept.* 21, 1885.

Received of Hon. J. M. Woolworth four hundred sixteen & $\frac{14}{100}$ dollars, in full of the following taxes for the year 1884 on the annexed property or real estate:

Part of section or name of town.	Sec. or lot.	Town or blk.	R'ng.	Acres.	Valuation.	Sch'l tax.	Labor.	Dog.	Village.	Interest.	Am't of tax.	Total.
					$	$ Cts.	$	$	$ Cts.	$ Cts.	$ Cts.	$ Cts.
Undi. ¼ S. ½ N. W. N. E.	10	15	13	.....	500	.....	.....	.....	.....	.....	.....	11 68
" S. W. N. E.	"	"	"	.....	2,000	.....	.....	.....	.....	.....	.....	46 75
Lot 8	22	"	"	.....	6,500	.....	.....	.....	.....	.....	.....	151 94
Omaha	5	151	.....	.....	2,100	.....	.....	.....	.....	.....	.....	49 09
Oakhurst	6	"	.....	.....	2,400	.....	.....	.....	.....	.....	.....	56 10
Oakhurst	1 to 6	1	.....	.....	420	.....	.....	.....	.....	.....	.....	9 82
	8 to 12	"	.....	.....	310	.....	.....	.....	.....	.....	.....	7 25
	13 to 18	"	.....	.....	320	.....	.....	.....	.....	.....	.....	7 48
	1 to 16	"	.....	.....	640	.....	.....	.....	.....	.....	.....	14 96
	17	2	.....	.....	30	.....	.....	.....	.....	.....	.....	70
	18	"	.....	.....	30	.....	.....	.....	.....	.....	.....	70
	1 & 2	3	.....	.....	100	.....	.....	.....	.....	.....	.....	2 34
	3 to 16	3 }	.....	.....	1,340	.....	.....	.....	.....	.....	.....	31 32
	1 " 16	4 }										
										Int.	.....	26 01
Total	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	416 14

Duplicate. (S'g'd)

JOHN RUSH, *Treasurer.*
—— ——, *Deputy.*

398 *Ex. q.*

$——. Office of county treasurer, Douglas county, Neb. No. ——.

OMAHA, NEB., *May* 29, 1886.

Received of J. M. Woolworth six hundred and twenty-three $\frac{54}{100}$ dollars, in full of the following taxes for the year 1885 on the annexed property or real estate:

Part of section or name of town.	Sec. or lot.	Town. or blk.	R'ng.	Acres.	Valuat'n.	School tax.	Waterloo.	Interest.	Am't of tax.	Total.
					$	$ Cts.	$	$ Cts.	$ Cts.	Cts.
Lot 8	22	15	13	.....	6,800	.....	$8,500	.....	.....	173 40
Omaha	5	151	.....	.....	2,200	.....	$23,000	.....	.....	56 10
"	6	"	.....	.....	2,500	.....		.....	.....	63 75
Sulphur Sp'gs add	.....	1	.....	.....	1,050	11 00	.....	$35 05	.....	39 05
"	.....	3	.....	.....	1,050	.....	.....	.....	.....	29 84
"	.....	6	.....	.....	1,700	.....	.....	.....	.....	43 35
Undi. ¼, balance of add	.....	.....	.....	.....	777 50	3 35	.....	79 70	.....	21 00
Undi. ¼ Sulphur Sp'gs reserve	.....	.....	.....	.....	600	2 63	.....	.....	.....	17 97
Oakhurst, 2 to	6	1	.....	.....	350					8 93
" 8 "	18	1	.....	.....	610					15 56
"	.....	2	.....	.....	700	.....	$1.91	30 00	.....	17 85
Except lot 2	.....	3	.....	.....	700					22 44
"	.....	4	.....	.....	880					94 10
Personalty	.....	.....	.....	.....	3,690	.....	.....	Int.	.....	2 35
Total	.....	.....	.....	.....	.....	.....	.....	.....	.....	623 54

Duplicate.

HENRY BOLLN, *Treasurer.*
—— ——, *Deputy.*

399 *Ex. r.*

$——. Office of county treasurer, Douglas county, Neb. No. ——.

OMAHA, NEB., *May* 18, 1888.

Received of J. M. Woolworth seven hundred seventy-six and $\frac{72}{100}$ dollars, in full of the following taxes for the year 1887 on the annexed property or real estate:

Part of section or name of town.	Sec. or lot.	Town. or blk.	R'ng.	Acres.	Valuation.	Sch'l tax.	Labor.	Dog.	Village.	Interest.	Am't of tax.	Total.
					$	$ Cts.	$	$	$ Cts.	$ Cts.	$ Cts.	$ Cts.
Oakhurst: All exc. lots—	2	3	.....	.....	5,638 75	.....	.....	.....	.....	.....	.....	127 57
	1	1										
City	5 & 6	151	.....	.....	6,800	.....	.....	.....	.....	.....	.....	144 80
Lot 8	22	15	13	1.37	8,500	.....	.....	.....	.....	.....	.....	192 31
Clark's	23	.....	.....	.....	650	.....	.....	.....	.....	.....	.....	14 25
	24	.....	.....	.....	900	.....	.....	.....	.....	.....	.....	20 36
Sulphur springs	.....	1	.....	.....	3,050	.....	.....	.....	.....	.....	.....	68 97
3, 4, 5, 7, 8, 9, 14, 15, 18, 19, 20, &	21	3	.....	.....	2,585	.....	.....	.....	.....	.....	.....	58 41
1, 2, 7, 8, 18, 19, 20, & 21	.....	6	.....	.....	2,850	.....	.....	.....	.....	.....	.....	64 49
Personalty	.....	.....	.....	.....	3,690	.....	.....	.....	.....	.....	.....	83 49
Int.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	2 07
Total	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	776 72

Duplicate.

HENRY BOLLN, *Treasurer.*
JOHN GROVES, *Deputy.*

400 *Ex. s.*

$——. Treasurer's office, Douglas county, Nebraska. No. ——.

OMAHA, *May* 15, 1889.

Received of J. M. Woolworth eight hundred forty-eight and $\frac{96}{100}$ dollars, in full of the following taxes for the year 1888 on the annexed property or real estate:

Part of section or name of town.	Section or lot.	Town. or block.	Range.	Acres.	Valuation.	School tax.	Interest.	Total.
								$ Cts.
Oakhurst: All exc. lot 2, bl'k 3, & lot 1, bl'k 1					19,380			387 60
S. ½ N. W.	35	15	12	80	1,040	6 24		27 04
N. ½ S. W.	"	"	"	"	1,000	6 00		26 00
E. ½ S. W. N. E.	26	15	12	20	600	3 60		15 60
N. E. S. E.	"	"	"	40	550	3 30		14 30
38 ac. N. E. S. W.	"	"	"	38	520	3 12		13 52
Clark's add.	23							
S. ½	24				1,710			34 20
Lot 8	22	15	13	1.37	9,500			190 00
Sulphur Springs: Ad.		1			3,505			70 10
	1 to 5	3			900			18 00
	7 to 9	"			640			12 00
	14 and 15	"			460			9 20
	18 to 21				830			16 60
	1 and 2	6			700			14 00
Total								848 96

Duplicate. (S'g'd) HENRY BOLLN, *Treasurer.*
—— ——, *Deputy.*

401 *Ex. t.*

$——. Treasurer's office, Douglas county, Nebraska. No. ——.

OMAHA, *August* 27, 1868.

Received of James M. Woolworth ninety and $\frac{25}{100}$ dollars, in full of the following taxes for the year 1867 on the annexed property or real estate:

Part of section or name of town.	Section or lot.	Town or block.	Range or lot.	Acres or block.	Kind of tax.	Paid in cash.	In warrants.	Interest.	Total.
W. ½ N. W.	28	15	13	80	State general fund	1,500			
Omaha	15	151			State sink'g fund	885			
					State school	1,180			
					Co. sinking bond	1,180			
					Land road	150			
					Co. general fund		1,770		
					Co. sinking fund		885		
					Court-house fund	295			
					Poor fund		1,180		
					Advertising				
					Total				

Duplicate. (S'g'd) W. J. HOHN, *Treasurer.*
—— ——, *Deputy.*

402 *Ex. u.*

No. ——. City treasurer's office. $——.

OMAHA, NEB., *Feb.* 28, 1887.

Received of J. M. Woolworth eighty-eight & $\frac{96}{100}$ dollars, in full for city taxes assessed on the following-described property in the city of Omaha for the year ending March, 1872:

	Lot.	Block.	General fund.	Sinking fund.	School fund.	Library fund.	Total.
							$ *Cts.*
Sec. 28, 15, 13, tract in N. W. N. W. ¼, now known as Oakhurst	.....	.....	20 00	12 00	.....	.....	32
Int	.....	.....	.....	.....	.....	.....	56 96
Year 1871.							88 96

(Duplicate.)

TRUMAN BUCK,
City Treasurer.
——, *Deputy.*

403 *Ex. v.*

No. ——. City treasurer's office. $——.

OMAHA, NEB., *Feb.* 28, 1887.

Received of J. M. Woolworth ninety-three & $\frac{60}{100}$ dollars, in full for city taxes assessed on the following-described property in the city of Omaha for the year ending March, 1873:

	Lot.	Block.	General fund.	Sinking fund.	School fund.	Library fund.	Total.
							$ *Cts.*
Sec. 28, 15, 13, tract in N. W. N. W. ¼, now known as Oakhurst	.....	.....	17 60	12 32	.....	.....	35 19
Int	.....	.....	.....	.....	.....	.....	58 41
Year 1872.							93 60

(Duplicate.)

TRUMAN BUCK,
City Treasurer.
——, *Deputy.*

404 *Ex. w.*

No. ——. City treasurer's office. $——.

OMAHA, NEB., *June* 24, 1875.

Received of James M. Woolworth fifty-six $\frac{10}{100}$ dollars, in full for city taxes assessed on the following-described property in the city of Omaha for the year ending March, 1875:

	Lot.	Block.	General fund.	Sinking fund.	School fund.	Library fund.	Total.
							$ *Cts.*
Und. ½ N. end W. ½ N. W. 17¾ ac	28	15	13 4	2	2	.....	8
	6	51	14	7	7	.....	28
Sweezy's add.	13	5	80	40	40	.....	1 60
	14	.....	1	50	50	.....	2
Personal	.....	.....	7 70	3 85	3 85	.....	15 40
Int.	.....	.....	55	28	27	.....	1 10
							$56 10

(Duplicate.)

CHRIS. HARTMAN,
City Treasurer.
—— ——, *Deputy.*

405 *Ex. x.*

No. ——. City treasurer's office. $——.

OMAHA, NEB., *Feb.* 28, 1877.

Received of J. M. Woolworth one hundred twenty-seven $\frac{27}{100}$ dollars, in full for city taxes assessed on the following-described property in the city of Omaha for the year ending March, 1871:

	Lot.	Block.	General fund.	Sinking fund.	School fund.	Library fund.	Total.
							$ *Cts.*
Sec. 28, 15, 13, tract in N. W. N. W. ¼, now known as Oakhurst	.....	.....	33 00	11 00	.....	.....	44 00
Int.	.....	.....	.....	.....	.....	.....	83 60
Year 1870.							

(Duplicate.)

TRUMAN BUCK,
City Treasurer.
—— ——, *Deputy.*

406 *Ex. y.*

No. ——. City treasurer's office. $——.

OMAHA, NEB., *July* 19, 1876.

Received of J. M. Woolworth twenty-seven $\frac{56}{100}$ dollars, in full for city taxes assessed on the following-described property in the city of Omaha for the year ending March, 1876:

	Lot.	Block.	General fund.	Sinking fund.	School fund.	Library fund.	Total.
							$ *Cts.*
Und. ¼ N. part W. ½ N. W. 17.75 ac. in 28, 15, 13	.....	.....	4 45	3 12	3 12	.....	10 68
Sweezy's add.:							
	13	5	80	56	56	.....	1 92
	14	5	1 50	1 05	1 05	.....	3 60
Personal	.....	.....	4 40	3 08	3 08	.....	10 56
Interest	.....	.....	34	23	23	.....	80
							$27 56

Duplicate. (S'g'd) CHRIS. HARTMAN,
City Treasurer.
——, *Deputy.*

407 *Ex. z.*

No. ——. City treasurer's office. $——.

OMAHA, NEB., *July* 17, 1877.

Received of J. M. Woolworth one hundred & $\frac{76}{100}$ dollars, in full for city taxes assessed on the following-described property in the city of Omaha for the year ending March, 1877:

	Lot.	Block.	General fund.	Sinking fund.	School fund.	Library fund.	Total.
							$ *Cts.*
Reed's add.:	5	151	25	10	10	.....	45 00
1 &	2	5	4	1 60	1 60	.....	7 20
3 and	4	"	4	1 60	1 60	.....	7 20
4, 5, 9, 7, and	8	6	7 50	3	3	.....	13 50
E. ½	12	6	1	40	40	.....	1 80
W. ½	13	"	1	40	40	.....	1 80
Und. ½ 17.75 ac. in N. W. N. W. ¼ 28, 15, 13	.....	.....	6 75	2 70	2 70	.....	12 15
Personal	.....	.....	5 10	2 04	2 04	.....	9 18
Interest	.....	.....	1 63	65	65	.....	2 93
							100 76

Duplicate. CHRIS. HARTMAN,
City Treasurer.
——, *Deputy.*

408 *Ex. a a.*

No. ——. City treasurer's office. $——.

OMAHA, NEB., *Feb.* 28, 1877.

Received of J. M. Woolworth nineteen & $\frac{43}{100}$ dollars, in full for city taxes assessed on the following-described property in the city of Omaha for the year ending March, 1880:

	Lot.	Block.	General fund.	Sinking fund.	School fund.	Library fund.	Total.
							$ Cts.
Sec. 28, 15, 13, undi ¼ of tract in N. W. N. W., now known as Oakhurst	.....	.....	3 50	3 50	3 50	18	10 68
Int.	.....	.....	.....	.....	.....	.....	8 75
							19 43
Year 1879.							

Duplicate.

TRUMAN BUCK,
City Treasurer.
—— ——, *Deputy.*

409 *Ex. b b.*

No. ——. City treasurer's office. $——.

OMAHA, NEB., *Sept.* 30, 1881.

Received of J. M. Woolworth three hundred and seven $\frac{10}{100}$ dollars, in full for city taxes assessed on the following-described property in the city of Omaha for the year ending March, 1881:

	Lot.	Block.	General fund.	Sinking fund.	School fund	Library fund.	Total.
							$ Cts.
	5	151	18	19 80	16 20	90	54 90
	6	"	23	25 30	20 70	1 15	70 15
In sec. 10, 15, 13:							
Und. ¼ S. ½ N. W. N. E.	10	ac.	7 25	7 98	.....	36	15 59
" ½ S. W. N. E.	20	"	18 50	20 35	.....	92	39 77
In sec. 22, 15, 13	8	.....	25	27 50	22 50	1 25	76 25
" 28, 15, 13	6	.....	7	7 70	6 30	35	21 35
Personal	.....	.....	4 75	5 23	4 27	24	14 49
Interest	.....	.....	.....	.....	.....	.....	14 60
							307 10

Duplicate. (S'g'd)

S. G. MALETTE,
City Treasurer.
—— ——, *Deputy.*

410 *Ex. c c.*

No. ——. City treasurer's office. $——.

OMAHA, NEB., *June* 27, 188-.

Received of —— —— — $_{100}$ dollars, in full for city taxes assessed on the following-described property in the city of Omaha for the year 1881:

Description.	Lot	Block.	Valuation.	Consolidated tax.
			$	$ Cts.
In sec. 10, 15, 13			750	23 25
Undi. ½ S. ½ N. W. N. E.			1,900	58 90
Und. ½ S. W. N. E.			7,000	217
In sec. 22, 15, 13	8		700	21 70
" 28, 15, 13	6			
	5	151	2,000	62
	6	"	2,300	71 30
Personal			1,930	59 83
Interest				10 28
				524 26

(Duplicate.)

TRUMAN BUCK,
City Treasurer.
——, *Deputy.*

411 *Ex. d d.*

No. ——. City treasurer's office. $——.

OMAHA, NEB., —— —, 1883.

Received of J. M. Woolworth five hundred and fifty-two & $_{100}^{80}$ dollars, in full for city taxes assessed on the following-described property in the city of Omaha for the year ending March, 1882:

	Lot.	Block.	General fund.	Valuation	School fund.	Library fund.	Consolidated tax.
In sec. 10, 15, 13:							$ Cts.
Und. ½ S. ½ N. W. N. E.				1,000			30
" ½ S. W. N. E.				2,000			60
In sec. 22, 15, 13	8			7,300			219
" 28, 15, 13	6			1,775			53 25
Omaha city	5	151		2,000			60
	6	151		2,300			69
2d w'd personalty				1,515			45 45
Int.							16 10
							552 80

(Original.) (S'g'd)

TRUMAN BUCK,
City Treasurer.
——, *Deputy.*

412 *Ex. e e.*

$——. City treasurer's office. No. ——.

OMAHA, NEB., *October* 31, 1885.

Received of W. M. Sage two and $\frac{93}{100}$ dollars, in full for city taxes assessed on the following-described property in the city of Omaha for the year 1884:

Description.	Lot.	Block.	Valuation.	Consolidated tax.
				Dolls. Cts.
Oakhurst	1	1	70	2 66
Int				27
				2 93

(Duplicate.)

TRUMAN BUCK,
City Treasurer.
—— ——, *Deputy.*

413 *Ex. f f.*

No. ——. City treasurer's office. $——.

OMAHA, NEB., *May* 30, 1885.

Received of J. M. Woolworth one hundred nineteen & $\frac{30}{100}$ dollars, in full for city taxes assessed on the following-described property in the city of Omaha for the year 1884:

Description.	Lot.	Block.	Valuation.	Consolidated tax.
Oakhurst:			$	$ *Cts.*
2, 3, 4, 5, 6	8	1	420	15 96
10, 11	12	1	160	6 08
13, 14, 15, 16, 17	18	1	320	12 16
(Except lots 17 & 18) all		2	640	24 32
178	18	2	60	2 28
(Except lot 8) all		3	750	28 50
(16 lots) all		4	640	24 32
				119 30

Original. (S'g'd)

TRUMAN BUCK,
City Treasurer.
—— ——, *Deputy.*

414 *Ex. g g.*

No. ——. City treasurer's office. $——.

OMAHA, NEB., *June* 1, 1886.

Received of J. M. Woolworth nine hundred fifty-four and $\frac{31}{100}$ dollars, in full for city taxes assessed on the following-described property in the city of Omaha for the year 1885:

Description.	Lot.	Block.	Valuation.	Consolidated tax.
			$	$ Cts.
In sec. 22, 15, 13	8		6,800	258 40
	5	151	2,200	83 60
	6	151	2,500	95
Sulphur Springs, blocks		13 & 6	3,970	150 86
Undi. ¼ of add			1,377	52 34
Oakhurst, except lots 1 &	7	1	3,280	124 64
Personalty			3,690	140 22
Int				49 25
				954 31

(S'g'd) TRUMAN BUCK,
City Treasurer.
H. H. CRANE, *Deputy.*

415 *Ex. h h.*

$——. Treasurer's office, Douglas county, Nebraska. No. ——.

OMAHA, *Sept.* 15, 187–.

Received of J. M. Woolworth seven hundred and two & $\frac{40}{100}$ dollars, in full of the following taxes for the year 1886 on the annexed property or real estate:

Part of section or name of town.	Section or lot.	Town, or block.	Range or lot.	Acres or block.	Valuation.	Interest.	Total.
Lot 8	22	15	13	1.37	7,650	.....	177 87
Omaha	5	151	.....	.....	2,500	.....	18 13
"	6	"	.....	.....	2,800	.....	65 10
Oakhurst, 2 to	6	1	.....	.....	425	.....	9 90
" 8 "	18	1	.....	.....	775	.....	18 00
"	.....	2	.....	.....	800	.....	20 34
" except lot 2	.....	3	.....	.....	910	.....	21 15
"	.....	4	.....	.....	1,120	.....	26 04
Sulphur Springs add	.....	1	.....	.....	2,002	.....	46 53
"	.....	3	.....	.....	2,189	.....	50 85
"	.....	6	.....	.....	2,937	.....	68 12
Sulphur Springs reserve, und. ¼	.....	.....	.....	.....	495	.....	11 51
" balance of add., undi. ¼	.....	.....	.....	.....	787	.....	18 35
Personalty	.....	.....	.....	.....	3,690	.....	85 79
Int	.....	.....	.....	.....	.....	.....	24 72
Total	.....	.....	.....	.....	.....	.....	702 40

Duplicate. (S'g'd) HENRY BOLLN, *Treasurer.*
(S'g'd) JOHN GROVES, *Deputy.*

416 *Ex. i i.*

$——. Treasurer's office, Douglas county, Nebraska. No. ——.

OMAHA, *Nov.* 5, 1887.

Received of J. M. Woolworth two and $\frac{18}{100}$ dollars, in full of the following taxes for the year 1886 on the annexed property or real estate:

Part of section or name of town.	Section or lot.	Town or block.	Range or lot.	Acres or block.	Kind of tax.	Paid in cash.	In warrants.	Interest.	Total.
						Valuation.			
Oakhurst					State general fund	85			1 98
					State gen'l fund				
					State school				
					Dist. school				
					Land and road				
					Poll tax				
					Co. sinking fund				
					Co. int. fund				
					Court house fund				
					Int.				10
					Add.				10
					Advertising				
Total									2 18

Copy.

HENRY BOLLN, *Treasurer.*
JOHN GROVES, *Deputy.*

417 *Ex. j j.*

No. ——. City treasurer's office. $——.

OMAHA, NEB., *M'ch* 29, 1887.

Received of J. M. Woolworth thirteen hundred — and $\frac{36}{100}$ dollars, in full for city taxes assessed on the following-described property in the city of Omaha for the year 1886:

Description.	Lot.	Block.	Valuation.	Consolidated tax.
			$	$ *Cts.*
Sec. 22, 15, 13	8		7,650	306
	5	151	2,500	100
	6	151	2,800	112
Sulphur Springs		1	2,002	80 08
		3	2,299	91 96
		6	2,937	117 48
Und. ½ of bale. exc. r't way			1,419	56 76
Oakhurst, except	1	1	4,105	164 20
"	7	1		
"	2	3		
Com. S. E. cor. bl'k 365, th. No. 120′ W. to line bet. Swee's 21 & 22, th. S. 120 & E. to beg.		365	2,500	100
Personalty			3,690	147 60
Int.				38 28
				1,314 36

(Duplicate.)

TRUMAN BUCK,
City Treasurer,
—— ——, *Deputy.*

418 *Ex. k k.*

No. ——. City treasurer's office. $——.

OMAHA, NEB., *Jan.* 31, 1888.

Received of J. M. Woolworth seventy hundred & seventy-six $\frac{1}{100}$ dollars, in full for city taxes assessed on the following-described property in the city of Omaha for the half year ending December 31st, 1887:

Description.	Lot.	Block.	Valuation.	Consolidated tax.
			$	$ *Cts.*
Oakhurst, all except lots	2	3	5,639	130 97
	1	1		
S. D. 25 & S. D. 21, 5 &	6	151	6,400	148 80
22, 15, 13	8	------	7,650	177 86
Clark's add.	23	------	630	14 65
"	24	------	900	20 92
Sulphur Springs	------	1	3,050	70 69
1, 2, 3, 4, 5, 7, 8, 9, 14, 15, 18, 19, 20, &	21	3	2,585	60 07
1, 2, 7, 8, 18, 19, 20, &	21	6	2,850	66 25
Personal	------	------	3,690	85 80
				776 01

(Duplicate.)

JOHN RUSH,
City Treasurer.
F. P. GRIDLEY, *Deputy.*

419 *Ex. l l.*

No. ——. City treasurer's office. $——.

OMAHA, NEB., *Oct.* 17, 1888.

Received of J. M. Woolworth fifteen hundred and seventy $\frac{86}{100}$ dollars, in full for city taxes assessed on the following-described property in the city of Omaha for the year 1888:

Description.	Lot.	Block.	Valuation.	Consolidated tax.
			$	$ *Cts.*
Oakhurst, all except	2	3	5,617	253 77
	1	1		
& 21	586	151	6,400	288
P. D. 32, 22, 15, 13	8	------	7,650	344 25
Clark's	23	------	630	28 35
"	24	------	900	40 50
Sulphur Sp'gs	------	1	3,050	137 25
1, 2, 3, 4, 5, 7, 8, 9, 14, 15, 18, 19, 20, &	21	3	2,585	116 33
1, 2, 7, 8, 18, 19, 20, and	21	6	2,850	128 25
Pers.	------	------	3,690	166 05
Int.	------	------	------	60 11
Ad.	------	------	------	8
				1,570 86

(Duplicate.)
3,593.76.

JOHN RUSH,
City Treasurer.
F. P. GRIDLEY, *Deputy.*

420 *Ex. m m.*

$——. City treasurer's office. No. ——.

OMAHA, NEB., *Oct.* 18, 1888.

Received of J. M. Woolworth eight hundred and sixty-six $\frac{10}{100}$ dollars, in full for special city tax assessed on the following-described property in the city of Omaha, being for grade of Pop. Ave.:

	Lot.	Block.	Amount of tax.
			Dolls. Cts.
Oakhurst—all that is assessed for the above grade			809 44
Int.			56 66
			866 10

(Duplicate.) (S'g'd) JOHN RUSH,
City Treasurer.
F. P. GRIDLEY, *Deputy.*

421 *Ex. n n.*

$——. City treasurer's office. No. ——.

OMAHA, NEB., *March* 18, 1889.

Received of J. M. Woolworth two hundred and sixteen $\frac{83}{100}$ dollars, in full for special city tax assessed on the following-described property in the city of Omaha, being for sidewalk for year 1889:

	Lot.	Block.	Amount of tax.
			Dolls. Cts.
Oakhurst	9	1	26 88
	10	1	26 99
	9	2	27 72
	10	2	28 24
	8	3	27 30
	9	3	27 20
	8	4	26 04
	9	4	26 46
			216 83

(Duplicate.) (S'g'd) JOHN RUSH,
City Treasurer.
F. P. GRIDLEY, *Deputy.*

422 *Ex. o o.*

$——. City treasurer's office. No. ——.

OMAHA, NEB., *March* 7, 1889.

Received of J. M. Woolworth two hundred and seventy $\frac{15}{100}$ dollars, in full for special city tax assessed on the following-described property in the city of Omaha, being for grade of 36 Leav. to Park street:

	Lot.	Block.	Amount of tax.
			Dolls. Cts.
Oakhurst	9		26 30
	10		34 83
	11		34 83
	12		34 83
	13		34 84
	14		34 84
	15		34 84
	16		34 84
			270 15

Duplicate. (S'g'd) JOHN RUSH,
City Treasurer.
F. P. GRIDLEY, *Deputy.*

423 *Ex. p p.*

No. ——. City treasurer's office. $——.

OMAHA, NEB., *May* 14, 1889.

Received of J. M. Woolworth thirty-one hundred & twenty-eight $\frac{15}{100}$ dollars, in full for city taxes assessed on the following-described property in the city of Omaha for the year 1889:

Description.	Lot.	Block.	Valuation.	Consolidated tax.
Oakhurst, ex. lots—			$	$ *Cts.*
1, 11, and	12	1	18,810	902 93
and	2	3		
	5	151	23,000	* 1,104
	6	151		
22, 15, 13	8	———	10,000	480
Clark's Add.	23	———	700	33 60
"	24	———	1,000	48
Sulphur Springs	———	1	3,505	168 27
Ex. lot 11	———	3	4,310	206 88
1, 2, 7, 8, 18, 19, 20, and	21	6	3,050	146 40
Pers., 4th w'd	———	———	600	28 80
" 3d w'd	———	———	200	9 60
				3,128 48

* This amount, $1,104, was paid by Mrs. J. W. Howard & duplicate receipt given.

(Duplicate.) (S'g'd) JOHN RUSH,
City Treasurer.

424 EXHIBIT "S S."

Know all men by these presents that whereas William S. T. Morton, late of the county of Wayne and State of Indiana, died seized and possessed of the following real estate, in the county of Douglas and State of Nebraska; and whereas the said Morton, at said county of Wayne and State of Indiana, died intestate, leaving as his executors Thomas McCullough and William A. Peelle, and as executrix Eliza M. Morton, with full power, as expressed in said will, to sell and convey any and all real estate of which the said testator died seized; that said will of said testator was duly probated in the clerk's office of the circuit court of said Wayne county, and letters testamentary duly issued to said executors and executrix, and said will was duly entered of record, as required by law, in the proper record in said county of Douglas and State of Nebraska:

Now, therefore, be it known that we, Thomas McCullough and William A. Peele, executors, and Eliza M. Morton, executrix, of the last will and testament of William S. T. Morton, deceased, in consideration of the sum of four hundred and forty-three and seventy-five one-hundredths dollars in hand paid, do hereby grant, bargain, sell, and convey to James M. Woolworth, of Omaha, Nebraska, the equal undivided one-half of the following real estate, situate as aforesaid in the county of Douglas and State of Nebraska, and bounded as follows, to wit:

Beginning at the northwest corner of section twenty-eight (28), in township fifteen (15) north, of range thirteen (13) east, of the sixth principal meridian, and running thence south eight (8) chains and five (5) links, thence south eighty-five (85) degrees east twenty (20) chains and ten (10) links, thence north nine (9) chains and seventy (70) links, and thence west twenty chains to the place of beginning, containing seventeen and seventy-five hundredths (17_{100}) acres, together with the appurtenances to the same belonging.

425 In witness whereof, as such executors and executrix as aforesaid, we have hereunto set our hands and seals this 4th day of June, A. D. 1879.

THOMAS McCULLOUGH. [SEAL.]
ELIZA M. MORTON. [SEAL.]
WILLIAM A. PEALE. [SEAL.]

In presence of—
G. M. ADAMS.
S. R. MOLLYNEAM.
THOS. WEBRAGE.
JAMES H. GUNTRY.

STATE OF OHIO, } ss:
County of Butler, }

Before the undersigned, a notary public in and for said county, this day came Thomas McCullough, one of the executors of the estate of William S. T. Morton, late of Wayne county, Indiana, de-

ceased, and acknowledged the signing and sealing of the foregoing to be his voluntary act and deed as such executor.

Given under my hand and seal this 4th day of June, 1879.

S. R. MOLLYNEAM,
Notary Public, Butler Co., Ohio.

STATE OF INDIANA, } ss:
Wayne County, }

Before the undersigned, a notary public in and for said county, this day came Eliza M. Morton, executrix, and William A. Peele, one of the executors of the estate of William S. T. Morton, late of Wayne county, deceased, and acknowledged the signing and sealing of the foregoing to be their voluntary act and deed as such executor and executrix.

Given under my hand and notarial seal this June 7th, 1889.

JAMES H. GUNTRY,
Notary Public, Wayne Co., Indiana.

EXHIBIT "T T."

Quitclaim Deed.

Know all men by these presents that Oliver P. Morton and
426 Lucinda M. Morton, his wife, in consideration of fifty dollars in hand paid, do hereby grant, remise, release, and forever quitclaim, without covenant of warranty, unto James M. Woolworth, of Omaha, Douglas county and State of Nebraska, the following-described real estate, situate in the county of Douglas and State of Nebraska, to wit: The equal undivided half of the following-described piece or parcel of land situate in the northwest quarter of section twenty-eight (28), township fifteen (15) north, of range thirteen (13) east, of the sixth principal meridian: Beginning at the northwest corner of said section twenty-eight (28), thence south eight (8) chains and five (5) links; thence south eighty-five (85) degrees twenty (20) chains and ten (10) links; thence north nine (9) chains and seventy (70) links; west twenty (20) chains to place of beginning.

Together with all the tenements, hereditaments, and appurtenances to the same belonging and all the estate, right, title, interest, dower, claim, or demand whatsoever of the said Oliver P. Morton of, in, and to the same or any part thereof:

To have and to hold the above-described premises, with the appurtenances, unto the said James M. Woolworth and to his heirs and assigns forever.

Signed this 24th day of June, A. D. one thousand eight hundred and seventy-three.

O. P. MORTON.
L. M. MORTON.

In presence of—
SARAH C. GALL.
WM. S. T. MORTON.

STATE OF INDIANA, } ss:
Marion County, }

On this 24th day of June, A. D. 1873, before me, a notary public in and for said county, personally came the above-named Oliver P. Morton and Lucinda M. Morton, his wife, who are personally
427 known to me to be the identical persons whose names are affixed to the above deed as grantors, and they acknowledged the instrument to be their voluntary act and deed.

Witness my hand and notarial seal the date aforesaid.

[SEAL.] JONATHAN S. HARVEY, (Signed.)
Notary Public.

Quitclaim Deed from Oliver P. Morton to James M. Woolworth.

Received for record this 12th day of July, A. D. 1873, at one o'clock p. m., and recorded in Book 14 of Deeds, page 341.

WM. J. IJAMS,
County Clerk, Douglas County.

EXHIBIT "U U."

Know all men by these presents that whereas William S. T. Morton, late of the county of Wayne, State of Indiana, died seized and possessed of the following real estate in the county of Douglas and State of Nebraska; and whereas the said Morton, at said county of Wayne and State of Indiana, died testate, leaving as his executors Thomas McCullough and William A. Peelle, and as executrix Eliza M. Morton, with full power, as expressed in said will, to sell and convey any and all real estate of which the said testator died seized; that said will of said testator was duly probated in the clerk's office of the circuit court of the said Wayne county and letters testamentary duly issued to said executors and executrix, and said will was duly entered of record, as required by law, in the proper record in the said county of Douglas and State of Nebraska, and said will having been allowed by the county clerk of Douglas county, Nebraska, as the last will and testament of the said William S. T. Morton, and a copy thereof was filed and recorded in said court;

And whereas afterwards the said executors and executrix sold and conveyed an undivided half of said premises to James M. Woolworth for four hundred and forty-three $\frac{70}{100}$ dollars by him paid
to them and a question having arisen as to the validity of
428 said deed; and whereas the said Eliza M. Morton has ceased to be executrix of the said will and becqne disqualified to act as such, and letters testamentary have issued out of the county court of Douglas county to said executors:

Now, therefore, in order to carry the said sale into execution and to vest the title in said Woolworth, free from all questions as to the validity of the deed heretofore conveyed to him, and in consideration of the said sum heretofore paid to us, we, Thomas McCullough and

William A. Peelle, executors of the said last will and testament of the said William S. T. Morton, deceased, do hereby grant, bargain, sell, and convey to James M. Woolworth, of Omaha, Nebraska, the equal undivided one-half of the following real estate, situate as aforesaid in the county of Douglas and State of Nebraska, and bounded as follows, to wit:

Beginning at the northwest corner of section twenty-eight (28), in township fifteen (15) north, of range thirteen (13) east, of the sixth principal meridian, and running thence south eight (8) chains and five (5) links; thence south eighty-five (85) degrees east twenty (20) chains and ten (10) links; thence north 9 chains and seventy (70) links, and thence west twenty (20) chains to the place of beginning, containing seventeen and seventy-five hundredths ($17\frac{75}{100}$) acres, together with the appurtenances to the same belonging.

In witness whereof we as such executors as aforesaid have hereunto set our hands and seals the 13th day of June, A. D. 1889.

(Signed) THOMAS McCULLOUGH. [SEAL.]
WILLIAM A. PEELLE. [SEAL.]

STATE OF OHIO, } ss:
County of Butler, }

Before the undersigned, a notary public in and for said county, this day came Thomas McCullough, one of the executors of the estate of William S. T. Morton, late of Wayne county, Indiana, deceased, and acknowledged the signing and the making of the foregoing
429 instrument to be his voluntary act and deed as such executor.

Given under my hand and notarial seal this 15th day of June, 1889.

P. F. FABER,
Notary Public, Butler Co., Ohio.

STATE OF INDIANA, } ss:
County of Wayne, }

Before the undersigned, a notary public in and for said county, this day came William A. Peelle, one of the executors of the estate of William S. T. Morton, and acknowledged the signing and sealing of the foregoing to be his voluntary act and deed as such executor.

Given under my hand and notarial seal this 15th day of June, 1889.

(Signed) PERRY J. FREEMAN,
Notary Public.

Be it remembered that on the 27th day of August, 1870, a bill was filed in the office of the clerk of said circuit court; which said bill is in words and figures following, to wit:

In Equity.

To the honorable the judges of the circuit court of the United States for the district of Nebraska:

Humbly complaining, show unto your honors your orator, Oliver P. Morton, of the city of Indianapolis, in the State of Indiana, who

is a citizen of said State, that on the 27th day of June, 1865, in the district court of the late Territory of Nebraska within and for the county of Douglas, your orator commenced the certain civil action against Roswell G. Pierce for the recovery of a certain sum of money then and there due and owing by said Pierce to your orator, and on said day sued and prosecuted out of said court an order of attachment, directed to the sheriff of said county, commanding him in due form of law to attach the goods and chattels, lands, tenements, and other property of the said Pierce in his county, which
430 order was on said day duly delivered to the said sheriff to be executed, and was by him duly levied upon the lands and premises hereinafter mentioned whereof the said Pierce was then seized.

And your orator further shows unto your honors that afterwards, and at the term of October, 1865, of said court, your orator, by the consideration and judgment thereof, recovered against the said Pierce $2,739 for his damages and $25 for his costs of his said action, and it was ordered by said court that the said lands and premises should be sold for the satisfaction of said judgment.

And your orator further shows unto your honors that afterwards and on the 16th day of May, 1868, your orator sued and prosecuted out of the district court of the State of Nebraska for said county an order of sale, directed to the sheriff of said county, reciting the said proceedings and commanding him, the said sheriff, to sell the said lands and premises upon due proceedings in that behalf for the satisfaction of the said judgment.

And your orator further shows unto your honors that, the said order of sale having been delivered to said sheriff to be executed, he, upon due proceedings in that behalf, und erand by virtue of the said writ and in pursuance of the command thereof, on the 29th day of June, 1868, at public auction, sold said premises to your orator for $1,775, he being the highest bidder and that being the highest sum bidden for the same.

And your orator further shows unto your honors that, the said sheriff having duly returned said order into the office of the clerk of said court with his said proceedings endorsed thereon, afterwards and at the term of July, 1868, said court, by its order in that behalf, duly confirmed said sale and directed the said sheriff to convey said premises to your orator by his sheriff's deed in due form of law.

431 And your orator further shows unto your honors that afterwards and on the 03th day of April, 1869, by virtue of the authority in him vested and in obedience to the said order, made his certain deed of conveyance as sheriff of said county, which said deed bore date on said day and was between the said sheriff, as party thereto of the first part, and your orator, as party thereto of the second part, and thereby the said sheriff conveyed said premises in fee to your orator.

And your orator further shows unto your honors that on the 18th day of January, 1860, in the said district court of said Territory, Herman Glass commenced against said Pierce his certain civil

action wherein he caused to be issued out of said court an order of attachment against the property of said Pierce, by virtue whereof said sheriff of said county levied on certain lands and premises situated in said county as the property of said Pierce, and such proceedings were had thereon that at the term of June, 1860, said Glass recovered a judgment against said Pierce for a certain sum of money and an order directing that said property so attached be sold to satisfy said judgment; that afterwards, upon some proceedings in that behalf had under said judgment and order, the exact nature whereof is to your orator unknown, said Glass claims to have obtained the title to said attached premises. Your orator further shows unto your honors that the lands and premises first above referred to so, as above stated, attached in your orator's behalf and sold and conveyed to him were not taken nor pretended to be taken upon the order of attachment so as aforesaid issued on behalf of said Glass nor upon any other proceedings in his said action save as is hereinafter stated; that said Pierce was not served with process in said action nor did he appear thereto nor did said court have jurisdiction of his person, but proceeded in said action to render judgment therein, as above stated, solely by virtue of
432 its jurisdiction acquired by virtue of said order of attachment and not otherwise to subject said attached premises to the payment of the demand of said Glass.

Wherefore your orator submits that said judgment — was as aforesaid recovered by the said Glass never became or was a lien upon the lands and premises so as aforesaid attached on your orator's behalf and to him sold and conveyed.

And your orator further shows unto your honors that on the 31st day of July, 1861, the said Glass caused to be issued out of the said district court of said Territory a writ of execution reciting said judgment by him recovered as aforesaid and commanding the said sheriff that of the goods and chattels, and for want thereof then of the lands and tenements, of the said Pierce he should cause to be made the sum of —— remaining unpaid on said judgment, in virtue whereof the said sheriff levied upon the lands first above referred to, and afterwards and in pursuance of the command of said writ offered the same at public sale and sold the same to said Glass; that said court afterwards confirmed said sale and directed said sheriff to convey said premises to said Glass, which was accordingly done and the said deed so by the said sheriff made to the said glass was duly recorded in the office of the register of deeds of said county on the 10th day of September, 1861, in Book of Deeds N, at page 531.

And your orator further shows unto your honors that on — 6th day of January, 1866, in the said district court of said Territory, your orator exhibited his certain bill of complaint and therein impleaded the said Glass and the said Pierce and alleged the matter hereinbefore recited and the said Glass duly appeared to the said bill and, having answered the same, the said cause came on to be heard in the said court before the honorable the judge thereof, who,

at the term of October, 1866, rendered his certain decree
433 whereby he declared and the said court by its said decree declared that the aforesaid judgment by the said Glass recovered was not a lien upon the premises first above referred to, and that the title to said premises was not affected by the pretended sale thereof to said Glass.

And your orator further shows unto your honors that on the 2nd day of July, 1866, there was placed upon the records in the office of the register of deeds of said county a deed bearing date on the 10th day of Dec., 1864, made between said Glass, as party of the first part, and Allen Root, of the city of Omaha, in the State of Nebraska, who is a citizen of said State, purporting to convey the premises first above referred to — said Root in fee; that said deed was duly acknowledged by said Glass and recorded, and by reason thereof and the record thereof a cloud is cast upon the title of your orator to the said premises; that said Root is not in possession of said premises, wherefore the rights of your orator cannot be settled at law. The premises above referred to are known and described as follows—that is to say, all that piece of land beginning at the northwest corner of section 28, thence south eight chains and five links, thence south 85 degrees 20 chains and 10 links, thence north 9 chains and 70 links, west 20 chains to place of beginning, in township 15, range 13 east, of the 6th principal meridian, and that the value of said premises is of the sum of two thousand dollars and over.

Wherefore your orator prays the aid of the court in the premises, and that it be by the decree thereof declared that the judgment so as aforesaid by said Glass recovered against said Pierce was not a lien upon the above-described premises; that the sale under the execution above mentioned, issued on said judgment, and the two
434 deeds to said Glass and said Root were void and of none effect, and that said Root be decreed to release said premises to your orator by an instrument to be approved by your honors, and that your orator may have all such other and further relief as the circumstances of the case require and as is agreeable to equity.

May it please your honors to grant unto your orator the writ of subpœna issuing out of and under the seal of this honorable court, to be directed to the said Allen Root, commanding him, by a certain day and under a penalty therein to be inserted, to be and appear before your honors and then and there to answer the premises, and further to stand to and abide such order and decree therein as shall be agreeable to equity and good conscience.

And your orator shall ever pray, &c.

J. M. WOOLWORTH,
Solicitor & of Counsel for the Plaintiff.

Upon the back of said bill appear endorsements in words and figures following, to wit: No. 40. U. S. circuit court, district of Nebraska. In equity. Oliver P. Morton *vs.* Allen Root. In equity. Bill. Filed August 27th, 1870. Watson B. Smith, clerk. J. M. Woolworth, sol. for pl'ff.

Thereupon, afterwards, to wit, on the 24th day of February, 1872, answer was filed in said case; which said answer is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

OLIVER P. MORTON, Co-plainant,
vs.
ALLEN ROOT, Defendant. } In Chancery.

The answer of Allen Root, defendant, to the bill of complaint of Oliver P. Morton, complainant.

This defendant, now and at all times hereafter saving and reserving unto himself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and
435 other imperfections in the said complainant's said bill of complaint contained, for answer thereunto or unto so much and such parts thereof as this defendant is advised is or are material or necessary for him to make answer unto, this defendant, answering, saith he believes it to be true that on the 27th day of June, 1885, in the district court of the late Territory of Nebraska within and for the county of Douglas, the said complainant commenced his certain civil action against one Roswell G. Pierce in the said bill of complaint named for the recovery of a certain sum of money then and there claimed to be due and owing by said Pierce to said complainant, and that said complainant did on said day sue and prosecute out of said court an order of attachment, directed to the sheriff of said county, commanding him in due form of law to attach the goods and chattels, lands and tenements, and other property of the said Pierce in his county, and that said order was on said day duly delivered to the said sheriff to be executed, but this defendant does not know the same of his own knowledge, and has not been and is wholly unable to discover any full record of any such proceedings, and this defendant therefore claims and insists that said complainant be required to make the same proof, if he can, of such facts as aforesaid in his said bill of complaint alleged as he would be required to make in case such facts were denied by this defendant; and this defendant, further answer-, saith that he denies that the said order of attachment was by the said sheriff duly levied upon any lands or premises or any part thereof in said bill of complaint mentioned, and he denies that the said Pierce was then seized of any such lands or premises or any part thereof as are in said bill of complaint mentioned and described or attempted so to be, but this defendant, humbly submitting his rights herein to the protection of this honorable court and craving the leave to have and insist upon such other good and equitable defenses to said bill of complaint as are in this his said answer contained, doth humbly claim and insist that there are no lands and
436 premises truly, properly, and lawfully described in said bill of complaint; and this defendant, further answering, saith

he believes it may be true that at the term of October, 1865, of said court the said complainant did, by the consideration and judgment thereof, recover against the said Pierce $2,739 for his damages and $25 for his costs of his said action, and that it was ordered by said court that the aforesaid alleged lands and premises should be sold for the satisfaction of said judgment, but this defendant does not know the same of his own knowledge, and has been and is wholly unable to discover any full record or memorial of any such judgment, and this defendant therefore claims and insists that said complainant be required to prove such judgment, if he can, in the same manner that he would be required to do had the recovery thereof been fully and directly denied by this defendant; and this defendant, further answering, saith he believes it to be true that on the 16th day of May, 1868, the said complainant sued and prosecuted out of the district court of the State of Nebraska for said county an order of sale, directed to the sheriff of said county, reciting such alleged proceedings and judgment and commanding the said sheriff to sell the said alleged lands and premises so as aforesaid mentioned and described in said bill of complaint or attempted so to be upon due proceedings in that behalf for the satisfaction of such alleged judgment, but this defendant does not know the same of his own knowledge, and he has been wholly unable to discover such order of sale and any full record or memorial in due form of law of the proceedings, if any, of such sheriff thereupon, and he therefore claims and insists that said complainant make such proof of the same, if he can, as he would be required to make had this defendant directly denied the same; and this defendant, further answering, saith he believes it may be true that, the said order of sale having
437 been delivered to said sheriff to be executed, the said sheriff, upon certain proceedings in that behalf pretended and attempted to be had or taken under or by virtue of such order of sale and pretended to be had or taken in pursuance of the command thereof, did, on the 29th day of June, 1868, at public auction, pretend and attempt to sell the alleged lands and premises mentioned and described in said bill of complaint or therein attempted so to be to the said complainant for $1,775, but this defendant does not know the same of his own knowledge and he has been wholly unable to discover any full and proper record of such alleged sale as is claimed and alleged in said bill of complaint, and he therefore asks and prays that said complainant be required to make such proof of the same as he would be required to do had the allegations in that behalf in said bill of complaint been fully denied by this defendant, but this defendant, humbly claiming the protection of this honorable court and humbly craving all benefit and advantage that may accrue to him by reason of the other good and equitable pleas or defenses in this his answer contained, doth claim and insist that if said order of sale ever was delivered to said sheriff to be executed as is alleged in said bill of complaint the said order of sale was void for uncertainty in the description of the lands and premises therein attempted to be mentioned and described, and this defendant

therefore denies that the said sheriff did, upon due proceedings in that behalf under and by virtue of such order of sale and in pursuance of the command thereof, on the 29th day of June, 1868, at public auction, sell any lands or premises whatever to the said complainant as is alleged or attempted so to be in the said bill of complaint; and this defendant, further answering, saith he believes it to be true that the said sheriff did duly return such alleged order of sale into the office of the clerk of said court, with his said alleged attempted and pretended proceedings endorsed thereon,
but not otherwise, and that afterwards and at the term of
438 July, 1868, said court by its pretended order in that behalf
did pretend to duly confirm such alleged sale and did direct the said sheriff to convey said alleged premises mentioned and described in said bill of complaint or attempted so to be to said complainant by his sheriff's deed in due form of law, but this defendant does not know the same of his own knowledge, and he has been and is wholly unable to discover the said alleged order of sale or the proper and full record or *removial* thereof, and he therefore insists that said complainant make such proof thereof as he would be required to make were the allegations in that behalf in said bill of complaint contained fully denied by this defendant, but this defendant, humbly insisting as before upon the benefit and advantage of his other good and equitable pleas or defenses herein contained to said bill of complaint, avers and insists that if any such return by said sheriff and order of confirmation of such alleged sale ever were made the same were and are wholly void and of non-effect by reason of the void and uncertain description of the alleged lands and premises mentioned and described or attempted so to *do* in such alleged return and order of confirmation and in the aforesaid alleged order of attachment, and this defendant therefore denies that said sheriff duly returned said order of sale into the office of said clerk with due and lawful proceedings endorsed thereon, as is alleged or attempted so to be in said bill of complaint, and that said court did afterwards and at the July term thereof, A. D. 1868, duly confirm such alleged sale and direct said sheriff to convey any lands or premises whatever to said complainant by his sheriff's deed in due form of law, as is alleged or attempted so to be in said bill of complaint; and this defendant, further answering, saith he believes it to be true that on the 13th day of April, 1859, by virtue of the pretended authority in him vested and acting upon the aforesaid pretended alleged order of confirmation,
the said sheriff did make his certain pretended deed
439 of conveyance as sheriff of said county, which said pretended
deed bore date on said day and was between said sheriff as party thereto of the first part and said complainant as party thereto of the second part, and that thereby the said sheriff pretended to convey the said alleged lands and premises mentioned and described in said bill of complaint, or attempted so to be, to said complainant; but this defendant does not know the same of his own knowledge nor otherwise save by the said complainant's said bill and from the records of deeds in the office of the county clerk of

said county of Douglas, in the State of Nebraska, in which records and in Book 6 of Deeds and at page 521 thereof this defendant has discovered what purports to be the record of such a deed duly acknowledged and recorded; and this defendant claims and insists that said complainant do make, if he can, such proof of any such deed as he would be required to make had the allegations in that behalf in said bill of complaint contained been fully denied by this defendant; and this defendant avers and insists that if any such deed ever was made as in that behalf alleged in said bill of complaint the same was and is insufficient to convey any estate, claim, right, title, or interest whatever of, in, or to any lands or premises whatever by reason of the unlawful, void, or uncertain description of the alleged lands or premises mentioned and described, or attempted so to be, in the order of attachment, judgment and order of sale, return upon order of sale, and order of confirmation so as aforesaid given, made, or issued, or pretended so to be; and this defendant therefore denies that on or about the 13th day of April, 1869, or at any other time, the said sheriff did, by virtue of the authority in him vested and in obedience to the order of sale alleged in said bill of complaint, made his certain deed of conveyance of the alleged lands and premisew mentioned and described, or attempted so to be, in said bill of complaint to said complainant, whereby the said sheriff conveyed such alleged lands and premises to said complain-
440 ant in fee; and this defendant therefore further denies that said complainant did thereby obtain or has ever obtained any claim, estate, right, title, or interest whatever to any lands or premises by reason of such alleged pretended conveyance as aforesaid to him; and this defendant, further answering, saith he believes it to be true that on the 6th day of January, 1866, in the said district court of said Territory, the said complainant exhibited his certain pretended bill of complaint, wherein he impleaded the said Glass and the said Pierce and alleged the pretended matters hereinbefore recited, and that the said Glass appeared and answered the same, as is alleged in said complainant's bill of complaint herein, and that said court, at the October term thereof, 1866, tendered its certain decree whereby it declared that the judgment recovered by said Glass against said Pierce and mentioned in said bill of complaint herein was not a lien upon the alleged premises mentioned and described or attempted so to be in said bill of complaint herein, and that the pretended title of the complainant herein to said alleged premises was not affected by the sale thereof to said Glass alleged in the bill of complaint herein, but this defendant avers and insists that the decree last aforesaid was and is void and of none effect by reason of the void and uncertain description of the alleged premises therein mentioned and described or attempted so to be and by reason of the void and uncertain description of the lands and premises mentioned and described in said complainant's said bill of complaint in this cause or attempted so to be, and this defendant therefore denies that said court ever rendered any such decree as is in that behalf alleged in said bill of complaint in this cause; and

this defendant, further answering, saith that for and during the two years last past he, this defendant, hath been and was at the time of the commencement of this suit and now is in the actual possession, use, and occupation of certain lands and premises
441 known and described as follows, to wit: All that certain piece or parcel of land situate, lying, and being in the said county of Douglas, State of Nebraska, and bounded and described as follows, to wit: Beginning at the northwest corner of the northwest quarter of section 28, in township 15 north, of range 13 east, of the 6th principal meridian, thence south 8.05 chs.; thence south 85 east 20.10 chains; thence north 9.70 chains; thence west 20 chains to the place of beginning, containing $17\frac{75}{100}$ acres of land, more or less; and this defendant, further answering, saith that he has been, was, and is so in the actual possession, use, and occupation as aforesaid of the lands and premises last above described, claiming title thereto under and by virtue of a certain deed thereof, in fee simple, from one Herman Glass and his wife to this defendant, dated and made on or about the 10th day of December, 1864, and now duly of record in the county clerk's office of said Douglas county, in Book T of Deeds, at page 239 thereof, whereby and by reason whereof this defendant claims and insists that if the lands and premises last above mentioned and described are the same identical lands and premises mentioned and described or attempted so to be in the said *said* bill of complaint in this cause, then the remedy or redress, if any, the said complainant ought to have is complete and adequate at law.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said bill charged; without this, that there is any other matter, cause, or thing in th*the* said complainant's said bill of complaint contained material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed and avoided, or denied is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court
442 shall direct, and humbly -rays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

KENNEDY & TOWNSEND,
Solicitor- & of Counsel for Defendant.

UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

Allen Root, being duly sworn, says that he is the defendant named in the foregoing answer; that he has heard read the said answer and knows the contents thereof, and that the same is true in point of fact, and that the said answer is not interposed for delay.

ALLEN ROOT.

Sworn to before me and subscribed in my presence this 20th day of May, 1871.

WATSON B. SMITH, *Clerk.*

UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

I, Rob't Townsend, one of the above-named firm of Kennedy and Townsend, solicitors and of counsel for defendant in the foregoing cause, do hereby certify that in my opinion the foregoing answer and the pleas therein contained are well founded in point of law.

Dated May 20th, 1871.

ROB'T TOWNSEND,
Of Counsel for Defendant.

Upon the back of said answer appear endorsements in words and figures following, to wit:

No. 40, B. U. S. circuit court. In chancery. Oliver P. Morton *vs.* Allen Root. Answer. Filed Feb'y 24, 1872. Watson B. Smith, clerk. Kennedy and Townsend, sol's for def't.

443 Thereupon, afterwards, to wit, on the 8th day of July, 1872, depositions *was* received and on the 11th day of November, 1872, opened by order of court; which said depositions *is* in words and figures following, to wit:

UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

Evidence taken by me, examiner in chancery, in a cause in equity pending in the circuit court of the United States sitting within and for the district of Nebraska, wherein Oliver P. Morton is complainant and Allen Root is defendant, in accordance with the stipulation hereto attached.

J. M. Woolworth, Esq., appeared for complainant, and B. F. B. Kennedy, Esq., appeared for defendant.

Dr. GEORGE SMITH, *who* being first duly sworn, as hereinafter certified, deposed as follows, to wit:

1st. What is the extent of your experience in and acquaintance with the business of surveying?

Ans. 18 years' experience. It has been my primary business the greater part of that time.

2nd. Look at the description of the premises here in question, as set forth on next the last page of the bill, and state whether the same describes a piece of ground by the boundaries thereof so that, the *y*oint of beginning being ascertained, you would be able by following the description to identify the tract.

Obj.—Defendant objects as immaterial and incompetent.

Ans. Yes; I could find the tract.

3d. What omission is there in the description?

Obj.—Defendant objects same as last above.

Ans. The direction of the second course is wanting. The word "east" should be supplied after eighty-five degrees.

444 4th. How do you ascertain that the point of compass is east?

Obj.—Defendant objects same as last above.

Ans. Because the departure in closing up is west. The last course is west.

GEO. SMITH.

Also J. M. WOOLWORTH, who, being first duly sworn, as hereinafter certified, deposed as follows, to wit:

I have been acquainted with the lands in question for at least ten years, and during the last four years have been over the same very frequently—sometimes daily, sometimes weekly; hardly ever, except in extreme winter weather, less frequently than once in two or three weeks. There have been no erections of any kind thereon or improvements or cultivation thereof or signs of actual occupations during all that time.

On cross-examination by defendant witness testified as follows:

How do you know of your own personal knowledge the tract of land so as to be able to identify it?

Ans. I know it by tracing the same according to the lines thereof as laid down in the city map and by having owned at one time sixty-three acres in the same eighty.

Is that all the means of knowledge you have on the subject?

Ans. That and the information this matter leads to.

Did you ever trace the lines by courses and measuring the distances of either of the tracts of land referred to in your answer?

Ans. Not with a compass. I have, however, by going upon the land and following the lines with a view of satisfying myself where, in a general way, they ran.

445 How did you ascertain the point of beginning?

Ans. By comparison of the same with the courses of the county farm, which adjoins the eighty on the west.

J. M. WOOLWORTH.

Also GEORGE ARMSTRONG, who, being first duly sworn, as hereinafter certified, deposed as follows, to wit:

What office do you hold and how long have you held the same?

Ans. I am now and have been since the 1st of April, 1867, clerk of the district court for Douglas county and State of Nebraska.

State whether or not you have made search in your office for the papers, including the files, pleadings, and process, in the case of Oliver P. Morton against Roswell G. Pierce, appearance docket No. 476, a copy of parts of which certified by you are here shown you. If so, state when, how thoroughly, and with what result.

Ans. I can't say exactly when I made the principal search, but within a month I made a thorough search for the said files and to-day looked in the place where they properly belong, and have not yet been able to find any of the files in the case referred to ex-

cept "an order of sale" and the return thereon by the sheriff, and I do not believe the files are in my office.

GEORGE ARMSTRONG.

Plaintiff offers in evidence a certified transcript of the said case of Oliver P. Morton against Roswell Pierce *et al.*

Also CHAUNCEY WILTSE, who, being first duly sworn, as hereinafter certified, deposed as follows, to wit:

What is the extent of your acquaintance with and experience in the business of surveying?

446 Ans. I have followed it for my profession for 18 years. I am well acquainted with Government surveys in all its details.

Look at the description of the premises in question in this case, as set forth on next the last page of the bill therein, and state whether or not the same describes a piece of land.

Obj.—Defendant objects as immaterial and incompetent.

Ans. It does; the description is defective in this, that in the second course from the place of beginning the letter "E." is omitted, meaning east. Being omitted, it becomes necessary for a surveyor to know whether it meant east or west, to determine which I return to the place of beginning and reverse the courses and distances until I arrive at the corners upon which this defective course close-, and find that to close the survey or retrace the boundary that this course must be south 85 degrees east twenty chains and ten links. I find also the word "thence" in third course omitted, which is not to a surveyor at all necessary in retracing the boundary line of any tract of land. "Thence" means from which point I run, which is of no use to a surveyor, being always assumed, of course.

Do you know where the point of beginning of this description is, and when, if ever, were you at the same?

Obj.—Defendants objects as immaterial.

Ans. I do; I assisted in the Government survey which placed it there. I was at the same corner we established originally a few days ago. I found the stone we placed there marked for the northwest corner of section twenty-eight.

When you were there at the last-mentioned time what did you do?

Obj.—Defendants objects same as last above.

Ans. I retraced the boundaries of the tract in question.

447 State what was the condition of the land in respect to occupancy.

Ans. I did not see any one occupying the land or any signs of occupancy or that it ever had been occupied.

CHAUNCEY WILTSE.

Thereupon the further taking of the evidence herein was adjourned till May 3d, 1872, at 1 p. m. At the time to which the adjournment was had parties appeared as heretofore, and the further taking of the evidence was adjourned to May 4th, at 4 p. m. At the time last aforesaid parties appeared as heretofore, and the further taking of the evidence was adjourned to May 8th, at 9 a. m. Thereupon the further taking of the evidence was continued to May 15th, at 4 p. m. At that time the parties appeared as heretofore, and the further taking of the evidence was proceeded in.

E. S. SEYMONS, being first duly sworn, as hereinafter certified, deposed *as* saith:

What office did you hold during the years 1868 and 1869?

Ans. I was deputy sheriff for the county of Douglas and State of Nebraska.

State whether or not, as such deputy sheriff, you had anything to do with the execution of an order of sale issued out of the district court for Douglas county in the case of Oliver P. Morton against Roswell G. Glass *et al.* If you answer that you did, state what you did in that regard.

Obj.—Defendant objects as immaterial and incompetent.

Ans. I did. I rec'd an order of sale from the clerk of the district court for Douglas county, and, *on* obedience to its commands, I had a certain tract of land described in said order of sale appraised by two residents of Douglas county in connection with myself as such deputy.

State whether or not your attention was called to the de-
448 scription of the tract directed to be sold in the said order, and whether you did anything, &, if so, what, to verify the correctness of such description. State all the circumstances connected with the matter.

Obj.—Defendant objects same as last above.

Ans. On receiving the order of sale I thought the description of the land was imperfect, and called the attention of Mr. Woolworth, one of the attorneys, to the description in the order of sale, remarking "that I thought it a poor or imperfect description." He told me, after consideration and examination of the description, that he thought it a sufficient description to identify the premises, and I made the description in the appraisement correspond with the order of sale accordingly. I think I compared this order of sale with a former order of sale or decree in the clerk's office and found it correspond- with the former order of sale or decree, whichever it was.

State whether or not you at that time examined the original order of attachment in the clerk's office. If so, state whether or not you compared the sheriff's return of property attached with the property ordered to be sold in the order of sale.

Obj.—Defendant objects same as last above.

Ans. I examined the papers in the case at that time, but whether

I compared this with the former order of attachment or not I can't say.

State whether or not you had been for the last 4 years acquainted with the premises in question in this cause, and whether you have been on the same; and, if so, how frequently.

Obj.—Defendant objects same as last above.

Ans. I have been acquainted with the tract in question for over 8 years. I have been on it, with a view to determine its location, three times during that time. I was on it first in 1869, about the time the first or second order of sale was issued—in the spring of 1869. I was on it twice in 1870.

449 What was the situation of the property at the several times you saw it with respect to occupancy?

Ans. I saw no sign of the premises being occupied when I examined it; I at two different times followed the lines as near as I could without a compass, seeing how it lay and to ascertain its value.

On cross-examination by defendant, witness deposed as follows

How do you know what particular tract of land you went upon at the times you have referred to?

Ans. Before going out to the land I made a map of the land in question, with the land adjoining, so as to be able to determine its exact position, so that I could not be mistaken. I may not have followed the north or south line exactly, but very nearly.

How were you able to make a map of the premises and the adjoining premises?

Ans. I copied from the map of the county and from the description of the land.

Is that all the means of knowledge you have with reference to the locality of the premises in question?

Ans. That is all.

Might there not have been improvements on the land in question at the time you were last there and you not have seen them?

Ans. There may possibly have been some improvements, though I think I should have seen them if there had been any, unless such improvements, if any, were among the timbers.

E. S. SEYMOUR.

Thereupon the further taking of the evidence was adjourned to May 25th, 1872, at 2 p. m. at that time.

450 And the defendant produced M. J. RAGAN, who, being first duly sworn as hereinafter certified, deposed as follows:

State your name, age, and place of residence.

Ans. M. J. Ragan; 21 years; I live in Selden & Isaac's addition to Omaha.

Look at next the last page of the bill and state whether you are acquainted with the parcel of land therein described.

Ans. I am.

State whether or not you have seen any improvements thereon within the last 2 years; and, if so, state of what they consisted.

Ans. Yes, sir; I saw last year in May or June about an acre and ½ or two acres planted with potatoes.

State who planted those *patotoes*.

Ans. John Cooper; who was working for Mr. Root. I was there also when he was grubbing it up.

State what, if anything, you saw done on this land in the year 1870.

Ans. I think I saw some grubbing done on it in the fall.

M. J. RAGAN.

Also ALLEN ROOT, who, being first duly sworn as hereinafter certified, deposes as follows:

State your name, age, place of residence, and relation to this suit.

Ans. Allen Root; reside in Omaha, and defendant in this suit.

Are you acquainted with the premises or land in controversy in this action? If so, state how long you have been so acquainted with it.

Ans. I know the land, and have known its location ever since 1864; that was when I purchase- it.

451 State what acts of ownership or possession you have exercised over said land since that time; state all about it.

Ans. I have paid the taxes regularly up to the commencement of this suit. In the fall of 1869 I commenced to clear and occupy it. In 1870 & 1871 I finished clearing 2 acres and planted 1½ acres of potatoes. I have frequently warned people off the premises who were cutting timber on it, and have protected the property, and have been on said premises as often as once a week during the last two years, *and as often as once a week during the last two years*, and as often as once a month ever since I owned it.

Describe the tract of land improved and occupied by your with reference to the section lines.

Ans. It lies in the northwest corner of the northwest quarter of sec. 28, town. 15 north, range 13 east, of the 6 P. M.

About what distance and in what general direction from the sec. corner referred to by you is the acre & ½ cultivated by you to potatoes?

Ans. About 35 or 40 rods south of east from the corner and nearly on the section line on the south side thereof.

ALLEN ROOT.

Thereupon the further taking of the evidence was adjourned to May 27th. At that time the parties appeared and the further taking of the evidence was proceeded in.

Also O. B. SELDEN, who, being first duly sworn as hereinafter certified, deposed as follows:

State your name, occupation, and place of residence.

Ans. O. B. Selden; farmer; reside in West Omaha.

State whether or not you are acquainted with the northwest

quarter of the northwest quarter of sec. 28, town. 15 N., range 13 east, of the 6th P. M.; and, if so, how long you have known that piece of land.

Ans. I am acquainted with it, and have been since 1854.

452 State whether or not you now live on the land adjoining the tract just now described on the north and how long you have lived there.

Ans. I live in the section of land adjoining that on the north. I have for the last 6 years.

What improvements, if any, or acts of occupancy upon the tract of land first referred to have been made in the last 3 or 4 years?

Ans. A small piece of the land has been grubbed out and potatoes raised on it last year, 1871. The grubbing was done the year before.

How frequently have you seen the piece of land that was improved during the last 3 years?

Ans. Not very frequently; perhaps a dozen times a year.

O. B. SELDEN.

(2 days, 8 miles.)

Also NELSON HARTGROVE, who, being first duly sworn as hereinafter certified, deposed as follows:

Ques. State your name, age, and place of residence.

Ans. Nelson Hartgrove; aged 52 years; I live in Douglas precinct, Douglas county, State of Nebraska.

Ques. State whether or not you are acquainted with the northeast quarter of the northeast quarter of section 28, and being a part of the premises in controversy in this action.

Ans. I know where the property is and have been on it.

Ques. What improvements, if any, has there been upon said premises and when did you first see such improvements?

Ans. There is about 1½ or 1¼ acres grubbed clean and smooth. I first saw that improvement about the 1st of March one year ago, and then saw it afterwards when it was planted in potatoes, probably about 2 months after that. The improvements was made near the north line. It was about ⅓ of the distance from the northwest corner to the northeast corner of the 40 acres tract.

453 Ques. State how you know the premises.

Ans. About 2 years ago I proposed buying 1 acre of ground of Mr. Root on the east side of his land, and we still kept bantering on the price until March a year ago, when we met and he showed me the premises.

NELSON HARTGROVE.

Fees, $10.00, paid by G. A. Root.

I, Wm. O. Bartholomew, examiner in chancery for the circuit court of the United States, do hereby certify that the above-named witnesses were by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth; that the foregoing depositions were by me reduced to writing and were by me

read over each to the several depositing witness- in the presence of the attorneys for the said parties, and that the said several depositions were signed by the several witnesses in my presence and in the presence of the counsel aforesaid; that all said proceedings were had in pursuance of the stipulation hereto attached.

WM. O. BARTHOLOMEW,
Examiner in Chancery.

In the United States Circuit Court, District of Nebraska. In Equity.

OLIVER P. MORTON
vs.
ALLEN ROOT.

It is hereby stipulated and agreed that the testimony of the parties to the above-entitled cause be taken before W. O. Bartholomew, master, commencing on the 23rd inst., at his office, and the cause be heard at the next term.

Omaha, Apr. 18, 1872.

J. M. WOOLWORTH,
Pl'ff's Sol.
B. E. B. KENNEDY,
Att'y for Resp't.

454 Endorsed: U. S. circuit court. Morton *vs.* Root. Stipulation.

Appearance Docket, — Term, Douglas County, N. T.

J. M. Woolworth.

OLIVER P. MORTON
vs.
ROSWELL G. PIERCE, JAMES H. JACKSON, JAMES M. PALMER, LAZ NOBLE. } C. 476. Attachment.

1865, Jan. 27. Petition filed.
Aff't for attachment filed.
Summons issued.
Attachment issued; 2.55 paid.
1865, July 10. Attachment returned served; 5.95 sheriff's fee.
" " Summons ret. served; no def'ts found; .20 sheriff's fee.
" Oct. 16. Proof of publication filed (printer's fee, 6.10).
" " 19. Default as to Pierce ent., .25.
Cause submitted to court for trial; judgment for pl'ffs against Pierce for $2,739; damages and costs taxed, $25.
1868, Jan. 31. Order of sale issued, .50.
" March 30. Filed appraisement, .10.
" April 27. Order of sale returned, .50; cl'k.
" May 18. Copy of appraisement filed, .10.
" July 28. Sale confirmed, .50.
Paid clerk, 12.73.

Execution Docket, Douglas County.

Received this writ the 31st day of January, A. D. 1868, and returned for want of time to advertise.

H. R. HOEL, *Sheriff*,
By E. S. SEYMOUR, *Deputy*.

455 May 16, 1868, issued order of sale. July 27 order of sale returned, endorsed as follows, to wit:

Received this writ May 16, 1868, at 3 o'clock p. m., and, according to the command thereof, I served the same on the following-described real estate the same day, to wit: All that piece of land beginning at the northwest corner of section 28, thence south eight chains and five links; thence south eighty-five degrees 20 chains and 10 links; thence north 9 chains and seventy links, west 20 chains, to the place of beginning, in township 15, range 13 east, 6th principal meridian, in Douglas county, Nebraska; and thereupon I summons Henry Gray and Thomas Swift, two disinterested freeholders of said county, and, having duly administered to them an oath impartially to appraise said land so levied upon, I did then and there, with the aforesaid freeholders, make valuation and appraisement of the said land levied upon, which said appraisement, signed by me and the said Henry Gray, is herewith returned into court. I also forthwith deposited a certified copy of said appraisement with the clerk of the district court of said county, and thereupon, on the 27th day of May, A. D. 1868, I caused a notice to be published in the Omaha Herald, a newspaper printed in said county of Douglas and in general circulation therein, that I would offer said lands for sale at the south door of the court-house, in the city of Omaha, in said county of Douglas, on the 29th day of June, A. D. 1868, at 10 o'clock a. m. of said day, and at the time and place stated in said notice I offered the said premises for sale at public auction and sold the same to Oliver P. Morton for the sum of one thousand seven hundred and seventy-five dollars, he being the highest and best bidder therefor, and that sum being two-thirds of the appraised value thereof.

456 Given under my hand this 7th day of July, A. D. 1868.

A. R. HOEL, *Sheriff*,
By E. S. SEYMOUR, *Deputy*.

Total of sale, 1,775.00; sheriff's costs—per cent. on sale, 31.75; execution, 1.00; calling appraisers, 60 cts.; appraisers, 1.00; inventory, 50 cts.; copy, .25; advertising, 6.85; making deed, $2; stamp, .50—$44.45.

Received from Sheriff Hoel $1,762.30, Ap'l 13, '69.

J. M. WOOLWORTH,
Pl'ff's Att'y.

Appraisement.

We, the undersigned, A. R. Hoel, sheriff of Douglas county, State of Nebraska, by E. S. Seymour, deputy, with Henry Gray and Thomas Swift, freeholders of said county, said freeholders having been first duly sworn by said deputy sheriff well and impartially to appraise said real estate taken by virtue of an order of sale issued out of the district court of said county in a certain cause, in which Oliver P. Morton is plaintiff and Roswell G. Pierce is defendant, do upon our oaths appraise the following-described real estate taken by virtue of said order of sale as the property of the said Roswell G. Pierce as follows, to wit, all that piece of land beginning at the northwest corner of section 28, thence south eight chains and five links; thence south 85 degrees 20 chains and 10 links; thence north 9 chains and seventy links west 20 chains to the place of beginning, in township 15, range 13 east, 6th principal meridian, in Douglas county, Nebraska, at one hundred and fifty dollars per acre.

HENRY GRAY.
THOMAS SWIFT.

Sworn to and subscribed to this 10th day of May, A. D. 1868.

A. R. HOEL, *Sheriff*,
By E. S. SEYMOUR, *Deputy*.

457 *Notice of Sale.*

STATE OF NEBRASKA, } ss:
Douglas County, }

Chas. P. Miller, being duly sworn, deposes and says that he is the book-keeper of the publishers and proprietors of the Omaha Herald, a newspaper printed at Omaha, in the said county of Douglas; that the printed notice hereunto attached was published in said newspaper four consecutive weeks next after May 27th, 1868; that said newspaper was during that time in general circulation in the county of Douglas.

CHARLES P. MILLER.

Subscribed in my presence and sworn to before me this 29th day of June, 1868.

[SEAL.] J. C. AMBROSE,
Notary Public.

Printer's fee, $5.00; affidavit, .25.

By virtue of an order of sale of the district court of Douglas county, Nebraska, made in a certain cause, wherein Oliver P. Morton is plaintiff and Roswell G. Pierce is defendant, I will, at the south door of the court-house, in the city of Omaha, in said county, on the 29th day of June, A. D. 1868, at 10 o'clock a. m., sell at public auction for cash to the highest bidder the following-described real estate, to wit, all that piece of land beginning at the northwest corner of section 28, thence south eight chains and five links, thence

south 85 deg. twenty chains and ten links, thence north nine chains and seventy links, west twenty chains to the place of beginning, in township 15, range 13 east of the sixth principal meridian, in said county of Douglas, taken as the property of the said Roswell G. Pierce.

A. R. HOEL,
Sheriff of Douglas Count-.

May 27, 1868.

458 *Order of Sale.*

DOUGLAS COUNTY, *ss:*

The People of the State of Nebraska to the sheriff of said county, Greeting:

Whereas Oliver P. Morton, on the 27th day of June, A. D. 1865, sued out of the clerk's office of the district court of said county an order of attachment directed and delivered to the sheriff of said county, requiring him to attach the lands, tenements, goods, chattels, stocks or interest in stocks, rights, credits, moneys, and effects of Roswell G. Pierce in said county not exempt by law from being applied to the payment of the plaintiff's claim or so much thereof as would satisfy the plaintiff's claim, and said sheriff returned said order executed by attaching the following property, to wit, all that piece of land beginning at the northwest corner of section 28, thence south eight chains and five links, thence south 85 degrees 20 chains and 10 links, thence north 9 chains and 70 links, west 20 chains to place of beginning, in township 15, range 13 east, 6th principal meridian, and afterwards such proceedings were had in said district court of Douglas county that at the October term thereof, A. D. 1865, the said plaintiff recovered a judgment against said defendant for the sum of $2,739, damages, and $25.00, the costs of said action:

You are therefore commanded to proceed as upon execution to advertise and sell so much of the property heretofore attached in this action now in your hands remaining as will satisfy the amount of this aforesaid judgment and costs, with interest thereon from the 17th day of October, A. D. 1865, until paid, together with accruing costs by virtue of this and subsequent orders, and do you make return of this order, together with your proceedings thereon,
459 within sixty days from the date hereof.

Witness my hand and the seal of said court, at Omaha, this 16th day of May, A. D. 1868.

[SEAL.] GEORGE ARMSTRONG, *Clerk.*

Oct. 18, 1865.

OLIVER P. MORTON
vs.
ROSWELL G. PIERCE, Impleaded with LAZ NOBLE & Others.

The said plaintiff having filed due proof of the publication of notice of the pending of this suit, and the defendant Pierce having failed to appear and answer the petition filed herein at the time

limited in said notice, and the statute having elapsed, it is, on motion of J. M. Woolworth, attorney of said plaintiff, ordered that the said petition be, and the same is hereby, taken as true; and it appearing from the proofs duly made to the court that the material allegations in said petition are true, the damages of the said plaintiff are hereby assessed at two thousand seven hundred and thirty-nine dollars. It is therefore ordered, considered, and adjudged that the plaintiff, Oliver P. Morton, recover against the defendant, Roswell G. Pierce, the sum of two — seven hundred and thirty-nine dollars for his damages and the costs of this suit, to be taxed; and it is now here further ordered that the real estate taken by the sheriff of this county — sold upon the like notice and proceedings as are by law prescribed for the sale of real estate on execution — the proceeds arising thereon be applied to pay this judgment.

THE STATE OF NEBRASKA, } ss:
Douglas County, }

I, George Armstrong, clerk of the district court for said county, do hereby certify that the foregoing are full and correct copies of the entries in appearance docket "C," the order of sale, the 460 returns of the sheriff on the order of sale, the appraisement, and the judgment of the court and all thereof in the case of Oliver P. Morton *vs.* Roswell G. Pierce *et al.* appearing on record in said court.

Witness my hand and the seal of said court, at the city of Omaha, this 20th day of April, 1872.

[SEAL.] GEORGE ARMSTRING, *Clerk.*

Upon the back of said depositions appear endorsements in words and figures following, to wit: No. 40, B. O. P. Morton *vs.* R. Pierce *et al.* Transcript. Received July 8, 1872. Opened by order of court and filed Nov. 11, 1872. Watson B. Smith, clerk.

Thereupon, afterwards, to wit, on the 8th day of May, 1873, opinion of Judge Dillon was filed in said case; which said opinion is in words and figures following, to wit:

In the United States Circuit Court, District of Nebraska. In Equity.

OLIVER P. MORTON }
vs. }
ALLEN ROOT. }

This is a bill in equity to settle the title to certain real estate. The plaintiff alleges in the bill title in himself, derived as follows:

1. On the 27th day of June, 1865, he sued Pierce in attachment in the district court of the then Territory of Nebraska for Douglas county, the writ of attachment issuing and being levied on the premises in question.

2. At the October term, 1865, judgment was entered, and also an order to sell the said lands and premises for the satisfaction of the judgment.

3. On the 16th of May, 1868, an order of sale was issued commanding the sheriff to sell the said lands.

461 4. In pursuance thereof he, on the 29th of June, 1868, sold the premises to the plaintiff.

5. At the July term, 1868, the sale was confirmed by the court.

6. On the 15th of April, 1869, the sheriff made the deed to the plaintiff.

To show an adverse claim of the defendant the bill alleges that one Glass sued Pierce in attachment; that the writ was levied on property other than that here in question and not upon the same; that Pierce was not served therein and did not appear thereto; that after the attached property was exhausted a general execution was issued, and the premises in question — to Glass, who conveyed to the defendant.

On the 2nd of July, 1866, a deed, dated December 10, 1864, from Glass to Root, of said premises was put upon the records of Douglas county. The defendant answers these allegations, saying that he believes them to be true, but the decree was void, because it described no premises.

To support the equity jurisdiction the plaintiff alleges that the defendant is not in possession of the premises. This the defendant denies, and alleges that at the time when this bill was filed he was and ever since has been and now is in the actual possession under the deed from Glass, dated and recorded as above stated.

The answer puts in issue the validity of the plaintiff's alleged title. The cause was submitted to the court upon proof taken by the respective parties.

J. M. Woolworth, for the complainant; B. E. B. Kennedy, for the defendant.

DILLON, *Circuit Judge:*

The first question to be settled is the jurisdiction of the court. This is conceded in the arguments to depend upon the facts

462 whether the defendant was at the time the suit was commenced in actual possession. If in possession, no reason is stated in the bill why the respective rights of the parties could not be determined in ejectment. The bill in this case was filed August 27, 1870. We find upon a careful reading of the evidence that no fences or permanent improvements of any kind have ever been made upon the premises. The acre and a half of potatoes were raised in 1871, and the weight of the evidence shows that the clearing off of the small quantity of land was in the fall of 1870, which would be after suit commenced. Upon the proofs in this cause the plaintiff could not have established possession in the defendant at the time this suit was brought, and the court has jurisdiction to determine the respective rights of the parties.

Both parties claim title under judicial sales against Pierce. The sale under which the defendant derives his right was void for the want of a valid judgment and execution. Jurisdiction over the person or property is absolutely essential to a valid judgment, and as the property here in question was not attached, and as the judg-

ment against Pierce was rendered upon constructive services by publication, there was no authority whatever to levy upon and sell this land.

This point is clear and has not been contested by the defendant's counsel in argument, but he has relied upon the unsufficiency or weakness of the plaintiff's title. We proceed briefly to notice his objections to this title.

It is urged that the court which rendered the plaintiff's judgment, and under the date upon which the plaintiff claims title, had no jurisdiction of the land — question.

Although a portion of the papers in that action have been lost, yet the entries on the appearance docket, the order of sale, the return endorsed thereon, the appraisement, the notice of sale, the
463 execution, the sheriff's deed to the plaintiff, all of which are produced, show that this objection is without foundation in fact.

It is also objected that the plaintiff's deed from the sheriff is void, because it and the precedent proceedings which it follows does not describe the land with sufficient certainty.

The description is as follows: "Beginning at the northwest corner of section 28, thence south 8 chains and 5 links, thence south 85 degrees twenty chains and ten links, thence north 9 chains and 70 links, west 20 chains to the place of beginning, in township 15, range 13 east of the 6th principal meridian."

The only defect pointed out is the omission of the word east in the second call in the description; but, as the testimony of the two surveyors examined as witnesses satisfactorily shows, this omission is easily supplied by the data afforded by the description as a whole. The only uncertainty is whether the second course is 85 east or west. As the last course is "west to the place of beginning," it is obvious that the course on the corresponding line on the south must be east. The testimony of Surveyor Wiltse puts this in a clear light. He says: "The description is defective in this, that in the second course from the place of beginning the letter 'E.' is omitted, *running* east. To determine whether it is east or west I return to the place of beginning and reverse the courses and distances until I arrive at the corner upon which this defective course must close, and I find that to close the survey or retrace the boundary that this course must be south 85 degrees east 20 chains and 10 links." And to the same effect is the evidence of George Smith, the only other surveyor examined — to the point. The description is just as certain as if the word east had been inserted. The result is that the
464 plaintiff is clearly the owner of the land in question and is entitled to the relief prayed, which is to remove the cloud upon his title and not for possession. Decree accordingly.

Dundy, J., concurs.

Upon the back of said opinion appear endorsements in words and figures following, to wit: No. 40, B. O. P. Morton *vs.* Allen Root. Opinion of Judge Dillon. Filed May 8, 1873. Watson B. Smith, clerk.

Thereupon, afterwards, at the May term of said court, on the 8th day of May, 1873, the following proceedings were had and done in said couse, as appears of record on folio 362, Journal "B" of said court, to wit:

OLIVER P. MORTON
vs.
ALLEN ROOT. } No. 40, B.

This cause came on to be heard upon the pleadings, proofs, and exhibits at a former term of the court and was argued by counsel and the court took time to consider the same, and now, being fully advised in the premises, it is ordered, adjudged, and declared by the court as follows—that is to say: That the judgment recovered by Herman Glass against Roswell G. Pierce in the district court of the Territory of Nebraska within and for Douglas county at the term thereof of July, 1860, was not and never was a lien upon the premises here in question; that the sale of said premises upon execution issued out of said court upon said judgment and a deed made by the sheriff of said county purporting to convey the said premises to said Glass and also the deed made by said Glass pretending to convey said premises to said defendant were and each and every thereof was utterly void and of none effect, and that the said proceedings and deeds do cast a cloud upon the title to said lands whereof said plaintiff is seized in fee.

And it is therefore ordered, adjudged, and decreed that the said defendants within ten days from the date of this decree make
465 a conveyance to be by him duly executed and acknowledged so as to be entitled to the same, to be recorded in the registry of deeds of said county conveying and releasing the said premises to the said plaintiff, and if the said defendant shall fail to make such conveyance within the time so limited that Watson B. Smith, who is hereby appointed a master in that behalf, make said conveyance in place of said defendant, and that the said conveyance so by the said master to be made be as effectual in all respects as if made by the said defendants.

And it is further ordered and adjudged that the said plaintiff have and recover of and against said defendant his costs of this suit, taxed at $89.96, and that execution issue therefor. The premises hereinbefore referred to and by this decree affected and ordered to be conveyed are described as follows: All that piece of land beginning at the northwest corner of section 28, thence south eight chains and five links, thence south 85 degrees 20 chains and ten links, thence north nine chains and 70 links, west 20 chains to place of beginning, in township 15, range 13 east, of the 6th principal meridian.

Pleas before the Honorable William Kellog, judge, at a district court for Douglas county, in chancery, held at the court-house, in the city of Omaha, on the 3rd day of November, 1886.

Be it remembered that heretofore, to wit, on the 6th day of January, 1866, Oliver P. Morton, by Jas. M. Woolworth, his attorney, filed in the office of the clerk of said court his bill of complain- against Roswell G. Pierce *et al.*; which said bill of complaint reads and is in the words and figures following, to wit:

In Chancery.

To the honorable the judges of the district court of the Territory of Nebraska for the first judicial district within and for Douglas county:

466 Humbly complaining, shows unto your honors your orator, Oliver P. Morton, of the city of Indianapolis, in the State of Indiana, that Roswell G. Pierce, Junius M. Palmer, James A. Jackson, and Laz. Noble were on the twenty-eighth day of August, one thousand eighteen hundred and fifty-seven, indebted unto one William S. T. Morton in a large sum of money, to wit, twenty-seven hundred and seventy-two dollars and ninety-two cents and over, and that in order to recover the said indebtedness of and against the said Pierce, Palmer, Jackson, and Noble the said William S. T. Morton instituted his certain civil action in the district court for the county of Pottawattamie, in the State of Iowa, against the said debtors, and that thereupon such proceedings were had that at the term of August, one thousand eight hundred and fifty-nine, in the said court, the said William S. T. Morton, by the judgment and consideration thereof, recovered agains- the said Pierce, Palmer, Jackson, and Noble the sum of two thousand six hundred and eighty-one dollars and sixty-seven cents for his damages by reason of the non-payment of that said debt, and also the sum of eighteen dollars and eighty-five cents for the costs and charges by him about his said suit in that behalf expended.

And your orator further shows unto your honor- that by divers *means* assignment- thereof the said judgment, on or about the twenty-fourth day of May, one thousand eight hundred and sixty-one, came to and became and was and still is the property of your orator; that divers payments have been made thereon, and there was on said day due the sum of two thousand dollars.

And your orator further shows unto your honors that on the twenty-seventh day of June last past he commenced a civil action in this honorable court, sitting at law, against the said Pierce, Palmer, Jackson, and Noble for the recovery of the amount due on the said judgment by filing in the office of the clerk of the said court his petition against them, in which he alleged the said

467 judgment and prayed a judgment of this honorable court, sitting at law, for the sum of two thousand dollars and interest thereon from the thirty-first day of May, one thousand eight hundred and sixty-one, and costs of suit; that together with the said petition was filed an affidavit, made by your orator's attorney,

to the effect that your orator and said Roswell G. Pierce were non-resident of and absent from this Territory; that said Pierce could not be served with summons in this Territory; that he has property in this Territory which was sought to be taken in attachment in said action; that your orator's claim was for money due him upon a judgment recovered by William S. T. Morton against the defendants in this action for $2,681.67 damages and $18.85 costs in the district court of Iowa for Pottawattamie county on the 9th day of August, 1859, which judgment had been duly assigned to your orator; that said claim was just, and, as the said deponent believed, your orator ought to recover in said action against said defendants $2,000 and interest from May 31st, 1859, and that said petition was true as the said deponent verily believed; that thereupon and on the day of the filing of the said petition and affidavit as aforesaid a writ of summons was issued out of the said court, under the seal thereof and duly stamped, directed to the sheriff of the said county of Douglas, directing him to notify the said Pierce, Jackson, Noble, and Palmer that they had been sued by your orator in this court, and that unless they answer said petition by the thirty-first day of July last past the same would be taken as true and judgment rendered accordingly, and also requiring the said sheriff to make due return of the said summons on the tenth day of said July, and that at the same time issued out of the said court an order of attachment in said cause, directed to the said sheriff of the said county of Douglas, commanding him, the said sheriff, to attach — safely keep
468 the lands and tenements, goods a-d chattels, stocks or interest in stocks, rights, credits, moneys, and effects of the said Roswell G. Pierce, Junius A. Jackson, Junius M. Palmer, and Laz Noble in his county not exempt by law from being applied to the pay-ent of your orator's aforesaid claim or so much thereof as would satisfy the same for two thousand dollars and interest from May 31st, 1861, and fifty dollars probable costs of said action, and to make due return thereof on the tenth day of July last past; that said order was duly sealed with the seal of said court and attested on the day of the issue .thereof as aforesaid by the clerk thereof, and that both said summons and said order of attachment were delivered to the said sheriff to be executed in due form of law on the day of the issuing thereof.

And your orator further shows unto your honor- that on the tenth day of July last past the said sheriff returned the said summons into the office of the clerk of the said court with his proceedings indorsed thereon—that is to say, that after diligent search he found none of the said defendants in his county; that on the twenty-seventh day of June last past he, the said sheriff of the said county of Douglas, having the said order of attachment, went up-n the premises hereinafter described and each thereof and then and there, in presence of Oscar F. Davis and John H. Kellom, who were resident freeholders of the said county, and in their hearing, declared that he attached said property and premises as the property of said Pierce, and, inasmuch as the same were unoccupied, he, the said sheriff, left in a conspicuous place on each thereof a certified copy

of said order; that he, the said sheriff, *after* having duly sworn the said Davis and Kellom truly to inventory and appraise said premises, the same were then and there well and truly and duly by them and said sheriff appraised and inventoried, and the said inventory and appraisement and the proceedings aforesaid of the
469 said sheriff were duly annexed to and endorsed on the said order of attachment, and thereupon and on the tenth day of July following was, by the said sheriff, duly returned into and filed in the office of the clerk of said court.

And your orator further shows unto your honor- that the lands so by the said sheriff and appraisers inventoried and appraised as aforesaid are described as follows: "That part of the northwest quarter of section twenty (20), commencing twenty chains south of the corner of sections 17, 18, 19, 20, thence with a variation of 11 degrees 35 minutes east south 15.60 chains to sod fence; thence east with a variation of 10 degrees 15 minutes east along said sod fence 40.06 chains; thence north with a variation of 11 degrees 85 minutes east 15.60 chains; thence west with a variation of 11 degrees 15 minutes east 40.08 chains to the place of beginning;" also that piece of land described as follows: "Beginning at the southeast corner of the northeast quarter of section 20, thence west 31.66 chains to a ditch fence; thence north 10 degrees 11 minutes east 3.11 chains to R. G. Pierce's corner; thence east 24.31 chains; thence north 1.75 chains; thence north seventy-two degrees east 7.18 chains to the east line of said section; thence south 7.56 chains to the place of beginning;" also that piece of land described as follows: Beginning at the corner of the sod fence, in southeast line of Dr. E. Lowe's claim, 11.43 chains south of corner sections 17, 18, 19, 20, thence with a variation of 11 degrees 50 minutes east south 8.57 chains; thence east with a variation of 11 degrees 50 minutes 40.08 chains; thence north w-th a variation of 11 degrees fifteen minutes east 8.57 chains; thence west with a variation of 11 degrees 15 minutes east 40.08 chains along said sod fence to the place of beginning; "also" all that piece of land known and described as follows: (Beginning at the northwest corner of section 28, thence south 8.05 chains; thence east 85 degrees east 20.10 chains; thence north 9.70 chains, and thence west
20 chains to the place of beginning, *all of said lands being*
470 *in the above to the place of beginning;* all of said lands being in the above-mentioned sections and in township 15 north and range 13 east of 6th principal meridian, and being situate in said county of Douglas, and the said Pierce being thereof seized in fee.)

And your orator further shows unto your honors that on the twenty-eighth day of June last past and thence for five consecutive weeks thereafter your orator caused to be duly published in the Nebraska Republican newspaper, which was and is published weekly in said county, a notice addressed to said Roswell G. Pierce, setting forth the parties to said action, notifying him of the filing of said petition and issuing of said attachment and pendency of said civil action, containing a summary but clear and distinct statement of the object and prayer of said petition, and requiring him to answer the

same on the 14 day of August, 1865, and signed by your orator's attorney.

And your orator further shows unto your honors that at the term of October of this court last past such proceedings were had in the said action that your orator, by the consideration and judgment of this court sitting at law, recovered in said action upon his aforesaid judgment the sum of twenty-seven hundred and thirty-nine dollars for his damages, besides costs of his suit in that behalf expended; and the said court did further order that the said property should be sold by the sheriff upon such proceedings as are by law prescribed for the sale of real estate by sheriff on execution.

And your orator further shows unto your honors that Herman Glass, of the county of Livingston, in the State of New York, pretends that, said Roswell G. Pierce being indebted to him in a sum of money, he, the said Glass, at some day to your orator unknown, commenced a suit in this honorable court for the recovery thereof and sued out an order of attachment therein and caused the lands aforementioned to be attached, and that the said court rendered a judgment in his
471 favor against said Pierce and ordered the said lands to be sold by the sheriff of the said county in order to satisfy the said judgment, whereas your orator charges the fact to be that the said judgment and order were and are utterly void because the same were rendered and made by said court without jurisdiction, for the reason that there was never filed in said cause any affidavit showing that the said Pierce could not be served with summons in this Territory, and also that, under and by virtue of the said attachment, the said sheriff did attach and hold certain personal property which the said Glass did release from the said attachment, and in some manner to your orator unknown did apply to his own purposes in fraud of the rights of said Pierce and his creditors, and by such his acts did release his attachment upon the said lands, if any he had; and your orator further charges that, notwithstanding the matters aforesaid, the said Glass did sue and prosecute out of said court an order addressed to said sheriff, commanding him to sel-, according to the course and practice of the court to sell, three undivided fourths of said lands; that the said sheriff offered the same for sale under and by virtue of the said order and the said Glass became the purchaser thereof; that the said Glass procured an order of this court confirming the said sale, and under and in pursuance thereof and on the — day of ——, one thousand eight hundred and sixty, the then sheriff of said county made, executed, acknowledged, and delivered to the said Herman Glass his deed in due form of law and reciting the aforementioned pretended proceedings and bearing date on said day, and thereby conveyed to the said Glass the undivided three-fourths of the said above-described premises, which deed was afterwards and on the — day of ——, in the year last aforesaid, duly recorded in the registry of the said county of Douglas.

And your orator further shows unto your honors that al-
472 though the said judgment was rendered without jurisdiction and was void because no process of summons was ever served on or notice of pendency of said suit was ever duly published to

the said Roswell G. Pierce, and he never voluntarily or otherwise appeared to the said action, yet the said Glass afterwards and on the thirtieth day of July, one thousand eight hundred and sixty-one, sued and prosecuted out of the said court a writ of execution, directed to the sheriff of the said county of Douglas, commanding him, the said sheriff, that of the goods and chattels and for want thereof of the lands and tenements in his county of the said Roswell G. Pierce he cause to be made the sum so as aforesaid by him, the said Glass, pretended to have been recovered in and by his aforesaid pretended judgment against said Pierce, and have those moneys, together with the said writ, with his proceedings endorsed thereon, at the office of the clerk of the said court within sixty days from the date thereof; that the said writ having been delivered to the said sheriff to be executed, such proceedings were had thereon that on the 14th day of September, in the year last aforesaid, he returned said writ into the said office with an endorsement thereon under his hand that he had levied the same upon the undivided fourth of the lands above described as the property of said Pierce and had advertised and sold the same to said Glass; that afterwards the said Glass procured an order of this court confirming said sale, and on the — day of ——, one thousand eight hundred and sixty-two, the then sheriff of the said county of Douglas, by his certain deed of conveyance in due form of law by him the said sheriff duly made, executed, acknowledged, and delivered to said Glass, conveyed to the said Glass the undivided fourth of said lands, and afterwards said Glass caused the said deed to be recorded in the registry of the said county of Douglas.

And your orator further shows unto your honors that the said Glass now claims to own the said lands under and in virtue
473 of the above-mentioned deeds and the above-recited proceedings; that no person is in the actual possession of the said premises; that the said Pierce is insolvent and without other property out of which your orator can collect his said judgment or any part thereof, and by reason of the cloud which is by the two deeds aforesaid and the proceedings above recited procured to be had by said Glass cast upon the said title to said premises your orator is unable by reasons of the above-recited proceedings in his behalf to collect his said debt or realize any material advantages from the said proceedings, and he will hoped the said Glass would have desisted from all claims to the said lands, as in equity and good conscience he ought to do.

Wherefore your orator prays that the said Roswell G. Pierce and Heman Glass may answer this, your orator's, bill, but not under oath, their answers under oath being hereby waived, and that it be by your honors' decree declared that all the proceedings above recited, taken, and had by said Glass and the two above-mentioned deeds are void, and he be decreed to surrender them to be cancelled; but should your honor find, on the final hearing of this cause, that the said lands and premises stand charged with the lien of the attachment in favor of said Glass, that an account may be taken of what is due thereon, and tha- your orator may be at

liberty to pay him the sum so found to be due, and he be decreed to assign said attachment lien to your orator; but should your honors find, on the final hearing of the cause, that all the attachment proceedings and the sale of three undivided fourths on the order of sale procured by said Glass are valid, then that the said execution and sale thereon be declared void and the lands sold be declared subject to the aforesaid attachment lien of your orator, and that he may have all such other and further relief as the circumstances of this case require and is agreeable to equity and good conscience.

And your orator will ever pray, &c.

JAS. M. WOOLWORTH,

474 *Solicitor & of Counsel for Complainant.*

TERRITORY OF NEBRASKA, } *ss:*
County of Douglas, }

James M. Woolworth, being duly sworn, says he is the solicitor of the complainant, Oliver P. Morton, in the above bill, who is a non-resident of and absent from this Territory; that said bill is true, to the knowledge of said deponent: that said bill is filed to exclude the defendants, Heman Glass and Roswell G. Pierce, from all interest in certain real estate situate in said county and Territory and subject the same to the payment of a lien of said complainant thereon; that said defendants are non-residents of and absent from and cannot be served with process in this Territory.

JAS. M. WOOLWORTH.

Subscribed in my presence and sworn to before me this 6th day of January, 1866.

ISAAC S. HASKELL,
Probate Judge, Douglas Co., N.T.

Afterwards, on the 6th day of January, 1866, a subpœna was issued herein as follows, to wit:

THE TERRITORY OF NEBRASKA:

To Heman Glass, Greeting:

We hereby command you that your appear in our district court of the first judicial district within and for the county of Douglas, in chancery, on the 5th day of February, 1866, to answer a bill of complaint exhibited against you in our said court by Oliver P. Morton, and to do further and receive what our said court shall have considered in that behalf.

The sheriff of Douglas county will return this writ on them 15th day of January, A. D. 1866.

Witness Hon. William Kellogg, judge of our said court, the 6th day of January, 1866.

[SEAL.] WM. KELLOGG, *Register.*

475 J. M. WOOLWORTH, *Solicitor.*

Afterwards, on the 9th day of January, said subpœna in chancery was returned, with the sheriff's return endorsed thereon as follows:

Received January 6th, A. D. 1866, the within subpœna. As commanded by this writ, I summoned the within-named Heman Glass on the 6th day of January, A. D. 1866, by delivering to him a certified copy of the within subpœna and of the indorsements thereon.

ANDREW DELLONE,
Sheriff, Douglas County, N. T.

Sheriff's fees, .95

Afterwards, on the 31st day of January, 1866, a demurrer was filed herein as follows, to wit:

In the District Court, Douglas County. In Chancery.

OLIVER P. MORTON, Complainant,
vs.
ROSWELL G. PIERCE *et al.*, Defendants.

The several demurrer of Heman Glass, one of the defendants, to the bill of complaint in this cause.

This defendant, by protestation, not confessing any of the matters and things in said bill charged, demurs to said bill, and for cause of demurrer shows to the court:

1. It does not appear by the bill that the complainant had any lien, by attachment or otherwise, prior to the attachment proceedings of said defendant in his suit against said Pierce.

2nd. It does not appear that this defendant has, by fraud or otherwise, impaired or *are* prejudiced said complainant in any way so as to interfere with the collection of his, complainant'-, debt.

3rd. It does not appear that debt on which this defendant obtained judgment in the attachment suit against said Pierce was not just and owing him — paid to this def't.

4. It does not appear that the lands were sold below their value to satisfy the defendant's judgment.

476 5. It does not appear by the bill that the court which rendered the judgment in favor of this defendant had no juristion.

6. It does not appear that the complainant has exhausted his remedy at law to secure the amount due in his alleged judgment.

7. The said bill does not set forth such facts as to entitle the complainant to the aid of the court.

And the defendant prays the judgment of the court whether he shall make further answer to said bill, and prays hence to be dismissed with costs.

REDICK & BRIGGS,
Solicitors for Glass, Def't.

The appearance docket shows that on May 4, 1866, "demurrer overruled and leave to answer in 60 days & con., but upon examina-

tion of the proceedings of said court on said date it does not appear of record on journal."

Afterwards, on the 30th day of June, 1866, an answer was filed herein as follows, to wit:

In District Court, Douglas County. In Chancery.

OLIVER P. MORTON, Complainant,
vs.
HEMAN GLASS *et al.*, Defendant-.

The separate answer of Heman Glass, one of the defendants, to the bill of complaint of said complainant.

The said Heman Glass, defendant, now and at all times hereafter saving and reserving unto himself all and all manner of benefit of exception to or otherwise that may or can be taken to the many uncertainties, errors, and imperfections in said bill contained, to such portions and so much thereof as he is advised that it is material or necessary for him to make answer unto, answering, says that he has no knowledge whether on the 28th day of August, 1857, or at any other time the said persons named in said bill *was* indebted to one William S. T. Morton in the sum of $2,770.92
477 or any other sum, in which said Morton brought suit against them in the district court of Pottawattamie county, in the State of Iowa, or any other court, nor which at the time of August, 1859, or at any other time the said Morton recovered a judgment against said Pierce and others for the sum of $2,681.60 or any other sum, and this defendant denies all such allegations and each and every one thereof and asks the complainant to prove the same.

And, further, said defendant says that he has no knowledge or information of the alleged assignment of said judgment to the complainant, as is alleged in said bill, in which payment has been made in said judgment, and therefore said defendant denies each and every allegation of said bill in that regard and asks the complainant to prove the same.

And, further, the defendant says that he has no knowledge or information whether on the 27th day of June "last past" or at any other time the complainant did commence a civil action in this court at law against said Pierce and others for the recovery of the amount due on said alleged judgment, nor whether an attachment was issued in due form of law, nor whether the same was duly placed in the hands of the sheriff of said county, nor whether said sheriff attached the lands hereinafter described, nor whether at the term of October, 1865, the complainant recovered a judgment against said Pierce *et al.* for the sum alleged in said bill or any other sum, and therefore the defendant denies each and every allegation of the bill in that regard and asks the complainant to prove the same; but the defendant expressly denies that said Pierce or any of the def'ts were notified of the pendency of said suit at law by publication in the manner required by law, and this def't says that there

was no legal service whatever on said def'ts in said suit at law, nor did either of them ever appear in the case either in person or by attorney, and for the reason that there was no summons served on either of them nor was there any such notice
478 published of the pendency of said suit at law required nor was the proper affidavit filed in the case to entitle the complainant to make a publication, and this def't, therefore, insists that said pretended judgment is void; and this def't further alleges that said complainant was not the owner of the judgment on which said pretended judgment was rendered, nor did he ever pay any consideration therefor, nor has he any interest therein nor in said pretended judgment; and this defendant further denies that either of said Mortons ever paid any consideration for either of said pretended judgments, but that both of them were rendered without any notice to said Pierce or knowledge on his part; and this defendant denies each and all of the allegations of the bill in regard to said judgments and each of them, and further denies that said Pierce had at the time of the alleged attachment of the lands described in the bill (and hereinafter described) any title or interest to or in said lands or any part thereof, but that the defendant was at that time and still is the lawful owner of all of said lands in fee simple, except as hereinafter stated, as will hereafter fully appear.

This defendant admits that he obtained the judgment against said Pierce mentioned in the bill; admits that he attached the lands described in the bill; admits that he caused the order of sale and execution mentioned in the bill to be issued in said judgment; admits that said lands were sold on said order and execution, and that he purchased the same at sheriff's sale; admits that the sales were both and all confirmed by the court; admits that the sheriff was ordered to deed the said lands to the purchaser, and admits that such sheriff did, in pursuance to such order, make deeds of said lands to this def't, and that the same were and are in due form of law and duly recorded in the register's office for said county before the year 1865;
479 but this defendant denies that his said judgment against Pierce was void for want of an affidavit for service by publication or for any other cause; but this def't alleges that he filed in the case before publication the affidavit required by law to entitle him to procure service on said Pierce by publication, and that if such affidavit cannot be found it has been lost or mislaid; and this defendant further denies that he caused to be attached in said action any personal property belonging to said Pierce, and denies that he ever released from said attachment any personal property of said Pierce; but this def't says that through mistake the interest of one — in a mortgage on other lands were attached in said action, and that when the mistake was discovered he released the same from said attachment.

And this defendant further denies that said Pierce was or is insolvent, and further denies that he has no property other than said lands out of which to make the amount — said pretended judgment.

And this defendant, further answering, says that the lands to

which he acquired title under said sheriff's sales set forth in the *the* bill are described as follows, to wit: "That part of the northwest quarter of section twenty (20) commencing twenty (20) chains south of the corner of section- 17, 18, 18, and 20, thence, with a variation of 11 degrees and 35 minutes east, south 15.60 chains to a sod fence; thence east, with a variation of 10 degrees and 15 minutes east, along said sod fence 40.06 chains; thence north, with a variation of 11 degrees and 85 minutes east, 15.60 chains, and thence west, with a variation of 11 — and 15 minutes east, 40.08 chains to the place of beginning, all in township 15 north, of range 13 east, in said county; and also that piece or parcel of land situated in said township and range described as follows: Beginning at the southeast corner of the northeast quarter of section twenty (20), thence west 31.60 chains -o a ditch fence; thence north 10 degrees and 11 minutes east 3.01 chains to R. G. Pierce's corner; thence east 24.31 chains; thence north 1.75 chains; thence north 22 degrees
480 east 7.18 chains to the east line of said sections; thence south 7.56 chains to the place of beginning; also that piece of land described as follows: Beginning at the corner of the sod fence on the southeast line of Dr. E. Lowe's claim, 11.43 chains south of the corner to sections 17, 18, 19, and 20, in said township and range, thence, with a variation of 11 degrees and 50 minutes east, south 8.57 chains; thence east with a variation of 11 degrees and 50 minutes, 40.08 chains; thence north, with a variation of 11 degrees and 15 minutes east, 8.51 chains; thence west, with a variation of 11 degrees and 15 minutes east, 40.08 chains along saod sod fence to the place of beginning.

And that piece of land described as follows: Beginning at the northwest corner of section 28, thence south 8.05 chains, thence east 85 degrees east 20.16 chains, thence north 9.70 chains, and thence west 20 chains to the place of beginning, all of said sections and lands being in said township 15 north, of range 13 east, of the 6th principal meridian, in said county, and being the same lands described and set forth in the complainant's bill of complaint.

And this defendant, further answering, says that after he had acquired title to the lands in the second description above set forth, and before the 1st day of January, 1865, he sold and conveyed by good and sufficient deeds the said lands to third persons, to wit, George R. Smith and —— Dickerson, for a valuable consideration to him paid, and that such deeds were duly recorded in the register's office for said county before said 1st of January, 1865, and that this def't had no interest whatever in said lands on the 27th of June, 1865, nor at the time this suit was commenced nor at this time, but that such third persons were then and now are the owners in fee of said lands and in the actual possession thereof and were in such possession at the time this suit was commenced, and to
481 the lands in the said fourth description set forth this def't derived title from said R. G. Pierce, who was then the owner in fee through said execution sale and deed from the sheriff as aforesaid, which deed was duly recorded in said register's office before the 27th of June, 1865, and that said Pierce derived his title in fee

from O. B. Selden, and Selden in fee from Jane A. North, and said North from the United States by pre-emption; all of which title passed by deeds in due form and all were duly recorded in said register's office before the 27 of June, 1865.

The said defendant alleges that he was on the 1st of December, 1861, on the 27th of June, 1865, at the *the* commencement of this suit, and still is seized of the premises, to wit, the lands described in the first and third description aforesaid, in fee simple, divested of all adverse claims and demands whatever, and that he derived title to said premises as follows, viz:

1. The United States passed its title to 62.44 acres of said tract situated on the north side of the south half of the northwest quarter of said section 20, in township 15 north, of range 13 east, in said county, to one John A. Lawrence under the provisions of the pre-emption law of the United States approved Sept. 4, 1841, — the year 1857, and that in said year 1857 the United States passed its title to the balance of said tract to one Enos Lowe under the provisions of said pre emption law, and that thereby said Lawrence and Lowe became seized in severalty in fee of all of said tract.

2. That on the 14th of August, 1857, said Lawrence, by deed in due form of law, conveyed his portion of said tract to one George A. Peters, and that said deed was duly recorded in the register's office for said county on the same day in Book H of Deeds, at page —, and that on the day before the said Lowe and wife, by deed in due form of law, conveyed his portion of said tract to said Peter, and that on the 27th of said August said deed was duly recorded in said office in Book G, at page —, so that on the 14th
482 day of said August the said Peters was well seized in fee simple of the whole tract.

3. That on the 8th day of April, 1858, said Peters and wife conveyed by deed the said 62.44-acre tract to Roswell G. Pierce (one of the def'ts), and that said deed was recorded in said office July 6th, 1859, in Book L of Deeds, at page —, and that on the 23rd of June, 1859, said Peters and wife, by another deed conveyed the remainder of said tract to said Pierce, and that on said 6th of July the same was recorded in said Book L, at page —, and that by the said two conveyances the said Pierce became seized of said tract in fee.

4. That on the 12th of April, 1859, said Pierce and wife did by deed of general warranty convey in due form of law the undivided one-fourth of said tract to one Ralph Marsh, and that said deed was duly recorded in said office on the 26th of said month in Book L of Deeds, at page —, and that thereby said Marsh became well seized of an estate in fee simple to an undivided one-fourth of said tract.

5th. That on the 24th of November, 1860, John C. L. Hileman, as sheriff of said county, conveyed by deed, in due form of law, the undivided three-fourths of said tract, including the lands in said second description set forth (being the interest of said Pierce in the same), to this defendant, which deed was duly executed and acknowledged and recorded in said office on the 7th of December, 1860, in

Book N of Deeds, at page 78, and that thereby this defendant became and is well seized in law and equity to an undivided ½ of said tract in fee simple, for and divested of all legal and equitable claims or demands to the same. This title is derived under the attachment proceedings, judgment, and order of sale mentioned in the bill as the suit at law in this court, in which this defendant was plaintiff and said Pierce def't, and also that *in* the 7th of Sept., 1861, the said sheriff conveyed to this def't by deed in due
483 form the remaining undivided ½ of said tract, together with the other lands mentioned in the bill *at* having been taken on execution issued on said judgment, which deed was duly recorded in said office on the 10th of said month.

6. That on the 9th of November, 1861, the said Ralph Marsh and wife did, by deed in due form of law, convey to this defendant the undivided one-fourth of said tract, including the lands in said second description set forth, being the interest of said Marsh in the same, and that said deed was duly executed and acknowledged and duly recorded on the 19th of said month in Book N of Deeds, at page 616, in said register's office, and that thereby this defendant became and is now lawfully seized of the whole of said tract in fee simple, and that this defendant paid to said Marsh a good and valuable consideration for the same.

7. And that on the 18th day of June, 1864, said Peters and wife did, by a quitclaim deed in due form of law, convey to this defendant all the right, title, and interest of said Peters and wife to the whole of said tract, including the lands in said 2nd description set forth, and that if any title or interest remained in said Peters after his making the conveyances aforesaid the same now vest fully and completely in this def't by virtue of said quitclaim deed; that said deed was duly executed and acknowledged and recorded in said office on the 29th of said month in Book P of Deeds, at page 532, and that this defendant paid said Peters a good and valuable consideration for said conveyance.

And this defendant denies all and all manner of unlawful combination and confederacy *to* which he is in said bill charged; without this, that any other matter in or thing by this answer not fully answered, avoided, traversed, or denied is true; all of which matters and things this defendant is and will be ready and willing to aver, maintain, and prove as this honorable court shall direct,
484 and prays hence to be dismissed with costs.

REDICK & BRIGGS,
Solicitors for Def't Glass.

Afterwards, at the October term of said court and on the 3rd day of November, 1866, a decree was rendered herein as follows, to wit:

OLIVER P. MORTON, Complainant,
vs.
ROSWELL G. PIERCE, HEMAN GLASS, *et al.*, Defendants. } Final Decree.

This day came this cause on to be heard on the bill of complaint and answer of Heman Glass, one of the defendants, and was argued

by counsel for Morton, complainant, and Glass, one of the defendants, and the court, being advised in the premises, do find the equity of the case with the defendant Heman Glass as to all the lands described in the bill, except as to the lands hereinafter described; and the court do further find that the equity of the case is with the complainant as to the following lands described in said bill, to wit, beginning at the northwest corner of section twenty-eight (28), thence south 8.05 chains, thence east 85 degrees east 20.10 chains, thence north 9.70 chains, and thence west 20 chains to the place of beginning, all in township 15 north, of range 13 east, in Douglas county, Nebraska.

It is therefore ordered, adjudged, and decreed by the court that the lien of complainant's judgment attaches to the said lands last above described, and that no right, title, or interest in the above-described premises were seized or taken or affected by the proceedings at law of the said defendant Glass in the pleadings mentioned and the lien of the said complainant is unaffected agains- the said Glass.

And it is further ordered, adjudged, and decreed by the court tha- the complainant's bill be, and the same is hereby, dis-
485 missed as to all of the other lands described in said bill at the costs of the complainant, which last-named lands are described as follows, to wit: "That part of the northwest quarter of section 20 commencing 20 chains south of the corner of sections 17, 18, 19, 20, thence, with a variation of 11 degrees 35 minutes east, south 15.60 chains to sod fence; thence east, with a variation of 10 degrees and 15 minutes east, along said sod fence 40.06 chains; thence north, with a variation of 11 degrees and 85 minutes east, 15.60 chains; thence west, with a variation of 11 degrees and 15 minutes east, 40.08 chains to the place of beginning; also that piece of land described as follows: Beginning at the southeast corner of the northeast quarter of section 20, thence west 31.66 chains to a ditch fence; thence north 10 degrees and 11 minutes east 3.11 chains to R. G. Pierce's corner; thence east 24.31 chains; thence north 1.75 chains; thence north 22 degrees east 7.18 chains to the east line of said section; thence south 7.56 chains to the place of beginning; also that piece of land described as follows: Beginning at the corner of the sod fence in the southeast line of Dr. E. Lowe's claim 11.43 chains south of corner to sections 17, 18, 19, 20, thence, with a variation of 11 degrees and 50 minutes east, south 8.57 chains; thence east, with a variation of 11 degrees and 50 minutes, 40.08 chains; thence north, with a variation of 11 degrees and 15 minutes east, 8.57 chains; thence west, with a variation of 11 degrees and 15 minutes east, 40.08 chains along said sod fence to the place of beginning, all in said township and range."

By the court:

WM. KELLOGG.

THE STATE OF NEBRASKA, } ss:
Douglas County, }

I, Frank E. Moores, clerk of the district court, third judicial district, of the State of Nebraska in and for Douglas county, do
486 hereby certify that the foregoing is a full and true copy of the proceedings in the case of Oliver P. Morton *vs.* Roswell G. Pierce *et al.* as appears from the original thereof now on file in the office of the clerk of said court.

Witness my signature and official seal this 7th day of May, 1889.

[SEAL.] FRANK E. MOORE, *Clerk.*

Certificate.

UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

I, E. S. Dundy, Jr., master in chancery of the circuit court of the United States for the district of Nebraska, in the eighth circuit, do hereby certify that the — day of —— named in the depositions hereto annexed I was attended at my office named in this annexed notice, in the city of Omaha, by the counsel and witnesses aforesaid; that the said witnesses were duly sworn and examined, and the depositions were reduced to writing and read to the witnesses and by them subscribed in my presence, except such as are not signed, the signatures to which were waived by the defendant. I further certify that Exhibits A, B, C, D, E, F, G, to Z, inclusive, and A A to V V, inclusive, except Exhibits "22" and "R R," which are not filed herewith (true, exact, and perfect copies of which are hereto attached, marked Exhibits A to Z, inclusive, and *a a* to *v v*, inclusive), were introduced in evidence in said cause during the taking of said deposition.

Dated November 9th, 1889.

E. S. DUNDY, JR.,
Master in Chancery.

Fees.

Depositions, 608 folios at 20 cents per folio	$121 60
Swearing 13 witnesses at 10 cents	1 30
47 exhibits	4 70
	$127 60
	$127 60

Upon the back of said depositions appear endorsements in words and figures following, to wit: No. 212, M. Filed Nov. 14, 1889. Elmer D. Frank, clerk.

487 In the Circuit Court of the United States.

JAMES M. WOOLWORTH, Plaintiff,
vs.
ALLEN ROOT, Defendant.

Before E. S. Dundy, Jr., master in chancery.

Appearances: For the plaintiff, Jas. M. Woolworth, Esq., and A. J. Poppleton, Esq.; for the defendant, G. W. Covell, Esq.

OMAHA, NEB., *August 9th*, 1889.

Testimony was taken of the following witnesses: J. E. House, Dr. Robert Dougherty, Byron Reed, Hans Rasmussen, Chris. Rasmussen.

488 J. E. HOUSE, called as a witness on the part of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. WOOLWORTH:

Plaintiff offers in evidence certified copy of the plat and the certificates attached thereto of Oakhurst.

Objected to by counsel for the defendant as immaterial and irrelevant.

The papers referred to are hereto attached, marked Exhibit A, and made a part hereof.

Q. What is your name, age, occupation, and place of residence?

A. My name is J. E. House; age, 57.; occupation, civil engineer; residence, Omaha, Nebraska.

Q. Are you the J. E. House whose name appears on the certificate of the survey of Oakhurst, a certified copy of which has just been introduced?

Objected to as immaterial and irrelevant.

A. Yes, sir.

Q. When did you make the survey of Oakhurst?

Objected to as immaterial and irrelevant.

A. In April, 1883.

Q. What did you do to it, Mr. House?

Objected to as immaterial and irrelevant.

A. I made a contour survey first to determine as to how the ground should be laid out, and then afterwards laid out the grounds to streets and alleys, lots, and so forth, and set stakes.

Q. What did you do in the way of fixing the corners of that tract?

Objected to as immaterial and irrelevant.

A. Stakes were set at the corners of every street and alley and every lot.

Q. I mean the whole tract, the corners of the tract, not simply of the lots and blocks.

Objected to as immaterial and irrelevant.

A. Surveys were made defining the boundary lines first.

Q. How much did you personally go over the tract at that time?

Objected to as immaterial and irrelevant.

489 A. O, I was around the entire outside of it and was on the lines of the streets.

Q. Of all the streets?

A. As they were laid; yes, sir.

Q. Mr. House, state whether or not you found any person living upon the tract at that time.

A. None.

Q. State whether you found any structures erected upon the tract at that time.

A. Nothing in the shape of a dwelling. There were the ruins of an old prairie barn that was on the south line, as I recollect it, at the head of one of the ravines near the center of the tract.

Q. Near the center of the tract—which way—east and west or north and south?

A. Well, that would be east and west. It was near the south line.

Q. Give us as accurately as you can a description of that ruin as you found it.

A. It consisted of a few forks on the ground covered with poles and partially covered with hay and decayed straw and hay at the side. There was a decayed manure pile close by. That was about all the evidence that I saw.

Q. State what appearance it had. State whether it had the appearance of having been used at a time shortly before the time you saw it.

A. O, I should say it had not been used for some time; probably a year or more.

Q. Could there have been any other erections on the tract and you not have seen them?

A. I think not, sir.

Cross-examination.

By Mr. COVELL:

Q. What year did you say this was?

A. This was in 1883.

Q. Wait a minute. When you went around the tract—on the different lines of the tract—what year?

A. In April, 1883.

490 Q. You say that you then did not see any other buildings of any kind upon the tract?

A. No, sir.

Q. Did you go all over the tract of land?

A. I went around the exterior lines of the tract, and then on the lines of the streets.

Q. You may state whether or not the land was prairie land or timber, or what kind of land it was, and whether or not it was covered with timber at that time.

A. It was all covered with timber, with the exception of a small corner on the west side.

Q. What was the character of that land?

A. There was some hazel brush and sumachs, and so forth, grown over it, but mostly prairie; that was near the northwest corner of the tract.

Q. What was the nature of the ground and its condition as to being timber or not timber near and along the south line of the tract?

A. The timber and brush came right up on the south line, with the exception of what I spoke of on the western line of the tract.

Q. State whether or not there was a fence along the south line of the tract at that time.

A. I would not state positively, but I think not, sir.

Q. You may state whether or not there was a fence along the east line of that tract at that time.

A. I think there was; yes, sir.

Q. What kind of a fence?

A. My impression is now that it was a post and board fence.

Q. You may state whether or not there were any other fences upon the tract, either upon the north line or running from the north line to the south line about the middle of the tract, if you know, at that time.

A. I do not recollect of any other fences at all, and I won't be positive with reference to this east fence, but I think there was a board fence on the east line.

Q. Did you go across the tract on the west slope of the hill or ridge near the center of the tract from north to south?

A. O, yes, sir.

491 Q. At that time?

A. Yes, sir.

Q. The slope that I direct your attention to is the west slope of the ridge and near the center of the tract, on the east of the first ravine as you go from the west toward the east. Did you go up there?

A. I passed these streets and run north and south through the tract. I was on each one of those streets the entire length of them.

Q. You may state whether or not you noticed any other fences on or around any other part of it than that which you have mentioned heretofore.

A. My memory does not serve me that there were any others at all.

(Witness excused.)

Dr. ROBERT DOUGHERTY, a witness for the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. WOOLWORTH:

Q. What is your name, age, occupation, and place of residence?

A. My name is Robert Dougherty; my age is 44; my occupation is a clergyman, teacher; my place of residence is Brownell hall, on South 10th street between Worthington place and Talbot place.

Q. In Omaha?

A. In Omaha.

Q. Have you any connection with Brownell hall? And, if you have, state the nature of it and how long it has existed.

Objected to by def't's counsel as immaterial.

A. I am rector of Brownell hall and a member of its board of trustees. I have been rector since 1876 and a member of the board of trustees since 1877.

Q. Dr., do you remember anything about a proposition made by the plaintiff in this action, James M. Woolworth, to give the hall any part of the property known as Oakhurst?

Objected to as immaterial.

A. Yes, sir; I remember a proposition made in July, 1883—
492 a proposition made by Mr. Woolworth to give a block of land in Oakhurst to Brownell hall.

Q. Let me call your attention to the year. Was it 1882 or 1883?

A. It was 1883.

Q. State whether or not the proposition was accepted by the board of trustees.

Objected to as immaterial.

A. The proposition was accepted.

Q. What did you do, if anything, in the way of selecting the part of the tract which you desired for the site of the school?

Objected to as immaterial.

A. I went over the tract and examined the four blocks of ground into which the tract was then divided and finally selected the third block counting from the east and made that selection of the block, consisting of 16 lots.

Q. How carefully did you go over the tract?

A. Why, I went over it several times and examined it very carefully with a view to the economy of erecting a building and the adaptability of the position with reference to the city and roads. I could not say how many times, but I must have gone over it nine or ten times since then.

Q. Were you accompanied by any other person; and, if so, by whom?

A. Yes, sir; I was accompanied by the late Bishop Clarkson at sometimes—not all the times—and by Henry C. Darrow, who was

an architect and at that time was working on plans for the building or the proposed building.

Q. State whether any person was living upon this land at that time.

A. No, sir; there was no person living there.

Q. State whether or not there was any house upon the tract at that time.

A. No, sir; there was no house on it.

Q. State whether there was any structure thereon or signs of a structure having been there.

A. There was a little shed on the south—on the ridge of that lot No. three—with some hay on the top of it—some old hay.

493 Q. State whether or not it had the appearance of having been used lately.

A. I do not think it had been used lately. I do not think it had been used. At the time I saw it I do not think it had been recently used.

Q. Why was not the building erected there?

Objected to as immaterial.

A. Because, on the advice of the architect, we believed it would have taken five or six thousand dollars to lay a foundation, and we did not have the money at that time.

Cross-examination.

By Mr. COVELL:

Q. At the time you went over this land do you remember of seeing any fences on the south side of it—on the south line of it—fence or fences?

A. I think, sir, there was a fence between it and the corn-field on the south. There was a field of corn on the south of it.

Q. What kind of a fence?

A. I could not say that.

Q. Do you remember of seeing any fence on any other portion of the land—say on the east side?

A. Yes, sir; there was a fence on the north side of it.

Q. What kind of a fence was that?

A. I could not positively say what sort of a fence it was. I think it was a board fence.

Q. Do you remember of seeing a fence upon the east side of the tract—upon the east line of the tract—at that time?

A. Yes, sir; I think there was a fence on the east side.

Q. What kind of a fence was that? Do you remember?

A. Well, I think that was a board fence—an old fence. I could not say just exactly the character of it.

Q. Do you remember of any other fence?

A. No, sir.

Q. Upon that tract or any part of it?

A. No, sir.

Q. Than that which you have named?
A. No, sir.

ROBERT DOHERTY.

(Witness excused.)

494 BYRON REED, called as a witness on the part of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. WOOLWORTH:

Q. What is your name, age, occupation, and place of residence?
A. Byron Reed; age, 60; residence, Omaha; occupation, real-estate and abstract business.
Q. How long have you lived in Omaha, Mr. Reed?
A. About 34 years.
Q. How long have you been engaged in the business of real estate and abstracting?
A. All that time.
Q. State whether or not you are familiar with the several issues of city directories issued by this city—issued of this city.
A. Yes, sir; I am familiar with them.
Q. Can you state in what years they were issued?

Objected to as immaterial.

A. I can state the most of the years. The first one was issued in 1866, and since then they have been issued every two or three years up to 1880, and since 1880 every year, I think, except possibly one.
Q. State whether in any of these issues maps of the city have been bound up.

Objected to as immaterial and not the best evidence.

A. Yes; there were city maps in most of them; most of the late ones; the first one had no map in.
Q. Can you state with reference to the issue of 1881–'2, whether there was a map?

Objected to as immaterial and not the best evidence.

A. I think there was a map in that; yes, sir.
Q. Are you acquainted with the premises in dispute here now known as Oakhurst?
A. Yes, sir; I am acquainted with it.
Q. How long have you been acquainted with those premises?
A. Ever since the land was surveyed by the Government.
Q. How are these premises marked upon the map bound up in the city directory for 1881–'2?

495 Objected to as immaterial, incompetent, and not the best evidence.

A. Well, I believe I made a memorandum of that. It appears in the name of Woolworth and Morton on some of the maps and as Oakhurst on others.

By Mr. COVELL: I move that this answer be stricken from the

record as being incompetent and not the best evidence, and as immaterial also.

Q. Mr. Reed, state whether or not in any of the issues of the directory from 1881–'2 to the present time these premises are marked in any other way than Morton and Woolworth and Oakhurst.

Objected to as incompetent and not the best evidence.

A. No; they are not in any map that I have seen.

Q. You may state if you can what issues of the directory contain these maps.

Objected to as incompetent and not the best evidence, immaterial, and irrelevant.

A. The directory of 1881–'2 contains a map whereon this land is marked Morton and Woolworth (referring to paper), and 1883–'4 it is marked the same, and some of the other maps; but I made this so hurriedly that I cannot tell really which particular ones they were.

By Mr. COVELL: I move that the answer be stricken from the record as incompetent, not the best evidence, immaterial, and irrelevant.

Q. Mr. Reed, can you state what maps of the city have been issued between 1875 and the present time, giving the parties publishing the same and the years upon which they were issued?

Objected to as immaterial, irrelevant, and as incompetent.

A. I can state them. I do not know whether I could state all of them right here now without making a little further examination, but I think I can.

Q. Will you please do so?

A. There is the Bemis map of 1883 is one, and there is an atlas map of 1885——

496 Q. Whose map?

A. It was in the atlas that was published. They call it the atlas map; and a lot of small maps published in 1884 and a map published by Mayne. I have not got the year, but that is two or three years ago.

Q. Upon these maps how were these premises marked?

Objected to as immaterial, irrelevant, incompetent, and not the best evidence.

A. They were marked as Oakhurst.

(Cross-examination waived.)

(Witness excused.)

By Mr. WOOLWORTH: I give notice that upon the hearing of this cause I will introduce and read in evidence a copy of the record of a deed made by Oliver P. Morton and wife to William S. T. Morton, dated June 24th, 1873, filed for record in the county clerk's office of Douglas county on the 14th day of July of the same year and

recorded in Book of Deeds 14, at page 347, duly certified by the registrar of deeds of said county.

Also I will introduce and read in evidence the city directories of the city of Omaha issued between the years 1875 and 1879 for the purpose of showing that no such man as Pierce described by the witnesses Gallagher and Root ever lived in this city.

Also the poll books of the city of Omaha for the precinct within which these premises lie, for the same reason.

Also the maps of the city which have been refer-ed to by the witness Reed.

Also certified copies of the records of the county court of Douglas county, Nebraska, touching the approval of the will of William S. T. Morton and the proceedings of the court thereunder.

Also tax receipts not heretofore introduced in evidence, the same not now being at hand.

I will say that the city directories which will be introduced will be for the years 1874–'5, 1876, 1878–'9, and 1879–'80.

497 I will also introduce and read in evidence the annual reports of the city engineer of the city of Omaha issued at any time, which contain maps of the city of Omaha, for the purpose of showing that upon these maps these premises are designated as Oakhurst.

Defendant objects to the introduction of these as incompetent, immaterial, and irrelevant at the time mentioned.

By Mr. WOOLWORTH: I will also introduce in evidence certified copies of the proceedings of the city council of the city of Omaha—the first of the proceedings had at a meeting on the 10th of July, 1883, and the other of the proceedings on the 31st of July of the same year.

Objected to by def't's counsel as immaterial and irrelevant.

The papers last referred to are hereto attached, marked Exhibit B and Exhibit C, and made a part hereof.

BYRON REED.

498 HANS RASMUSSEN, a witness for the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. POPPLETON:

Q. Please state your name, age, and place of residence.
A. My name is Hans Rasmussen. I reside on 27th and Leavenworth.
Q. In Omaha?
A. Yes, sir.
Q. What is your age?
A. Twenty-seven.
Q. What is your occupation?
A. I am in the feed business.
Q. How long have you lived in Omaha?
A. I cannot tell exactly. I think it is about 16 years.

Q. Are you acquainted with the piece of ground commonly known as Oakhurst?

A. Yes, sir.

Q. Belonging to Mr. Woolworth?

A. Yes, sir.

Q. How long have you been acquainted with that tract of land?

A. Why, it is some time between ten and twelve years, as far as—to the best of my knowledge.

Q. Have you ever lived in that vicinity?

A. I have lived north of that for about—I guess it is about eight years, I think; pretty near; seven or eight years.

Q. State, as near as you can, where you lived with reference, say, to Leavenworth street.

A. How far I live from Leavenworth?

Q. Yes; and how far from this tract of land?

A. This tract of land—the tract of land is one side of Pacific street—or Mount Pleasant, I believe, they call it out there—and I am on the other, the street between me and the land.

Q. To what extent were you acquainted with this land? Were you familiar with it while you lived there?

A. Well, I was not familiar with it, only I passed over it and looked over the land pretty near every day; seen the land pretty near every day, being the house faced east—or south, I should say; faced towards the land.

499 Q. Your house did?

A. Yes, sir; and there was only the street between it. I never had any doings or dealings with the land; only I seen the land.

Q. In going and coming to town did you pass over any portion of this tract?

A. Sometimes I went over it going to town on foot. I could not travel it by wagon, but I went over it by foot going to town.

Q. Are you acquainted with the location of Poppleton avenue as it runs with reference to this land?

A. Yes, sir.

Q. Which side of the land is it on?

A. It is on the north side.

Q. On the north side of Oakhurst—of the Oakhurst land—I am speaking of?

A. Poppleton avenue?

Q. Yes.

A. The land is on the north side of Poppleton avenue.

Q. The land is on the north side?

A. Yes, sir.

Q. Do you know a man named Aiken?

A. Yes, sir.

Q. Who lived in that neighborhood?

A. Yes, sir.

Q. Did he live north or south of Poppleton avenue?

A. He had a stable on the north side, and, to the best of my knowledge, his house was on the south side, although there was no

street graded there at the time, so you could not—and there was no surveying done when he lived there that I know of—so I cannot tell just where he lived, but to my knowledge it is, I think, south of the place; but he had a stable, and, as far as I know, that must have been on the north side of it, for that was quite a ways north of his house.

Q. Then, the stable that you speak of, what was it? How was it built?

A. I can't hardly tell how that was. I did not notice it much, but it is something like I could put up, or not a real mechanic.

Q. Were there any other buildings, dwelling-houses, or stable on the Oakhurst property—on the Oakhurst land—during the time that you lived there?

500 A. I seen one building or something in the farther east, I think, I don't know accurately about it. It is farther east and it was there for a short time only; I think I seen it broke down; I am pretty certain there was a little building there farther east on that land.

Q. Do you know whether anybody ever lived in it or not?

A. I do not know, but I think they did.

Q. But for a short time only, you say?

A. Yes; I don't know; I could not say how long, but I know it was not there for years. I don't know how many months it was there.

Q. State where the fence that was built around the Aiken property or around the property that Aiken worked—the land that Aiken worked—state where that fence was with reference to Poppleton avenue.

A. Well, that fence—you mean the fence that Mr. Aiken put up?

Q. Yes.

A. That was on the south side of Poppleton avenue, as far as I know, where the avenue would be at that time; it must be.

Q. Where was his house with reference to that fence?

A. Well, his house came right in line with the fence; his house formed part of the line—part of the fence.

Q. Which way did the house project from the fence, to the south or to the north? The fence lapped onto the house, didn't it?

A. Yes, sir; the fence lapped, I think, on the north corner; I would not say positively there, but I think, for it is so long ago, but I know it laid there and formed part of the fence, and I think the fence run—I know it run up to the corner of the house from both sides.

Q. The body of the house, then, was south of the fence, was it?

A. As far as I can remember, it was.

Q. Can you state when this house in the southeast corner of the lot was built that you have spoken of?

A. No; it seems to me like some couple of years ago or so.

Q. When did that disappear? You say it did not stay there long?

A. No; it did not stay very long, I don't think. I do not
501 exactly know how long it stayed; I can't give no date when

it was built nor when it was taken away, but it seems to me like it was a few—like it is about a couple of years ago since it was built; and I think it was taken away the same year that it was built again, I think.

Q. Is it there now?

A. No, sir.

Q. Do you know of your father's trying to lease the ground that Aiken worked and the house that he lived in?

A. Yes; I know. I did not hear it. I know what my father told me about it.

Def't's counsel objects to the witness telling anything that his father told him.

Q. You do not know it of your own personal knowledge?

A. No, no; I did not hear no bargain made between them, only what he told me. I was not present.

Cross-examination.

By Mr. COVELL:

Q. Mr. Rasmussen, what year was it that you first knew this land that they call Oakhurst?

A. When I first what?

Q. First knew this land that they call Oakhurst?

A. I say—I just told these parties I could not tell for sure. I have known it, I think, between ten and 12 years.

Q. Well, can you fix in your own mind the year that you first knew it?

A. No; I could not do it. I could not say about the year, I am sure. I have lived here so long that I——

Q. Did you know it before 1876?

A. I would not say. I cannot say whether I did or not. It is somewheres around that year that I knew it, I think, but I could not say.

Q. What street do you live on?

A. I lived on—I did live on—I moved off from there.

Q. You did live where?

A. Right next to the land.

Q. Did you live on Pacific street?

A. Yes, sir.

Q. When did you move away from Pacific street?

A. I moved away from there last fall.

Q. When did you first go there to live?

502 *Q. When did you first go there to live?*

A. Well, that is what I said—seven or about—pretty near eight years, I think.

Q. Eight years before you moved away from there?

A. Yes, sir; I lived there pretty near for eight years; I think it is. I can't say about it.

Q. That would make it 1880 when you went there to live?

A. 1880 or 1881; something like that; yes, sir.

Q. Did you know this land that they call Oakhurst before 1880?
A. Yes, sir; I did.
Q. Where did you live when you knew it before that time?
A. I lived upon John I. Redick's place, and I was herding town cattle.
Q. Where is John I. Redick's place?
A. That is the place now where I live, up near where Mr. Judge Dundy's house is now; in there somewheres. There was a small house, and I lived there at the time.
Q. How long did you live there?
A. I do not know. I lived there, I think——
Q. About how many years?
A. I do not think I lived there over a year or a year and a half. I cannot remember. I was young at that time, and I cannot tell you.
Q. Where did you live before that? Here; you need not ask him anything (referring to the witness' father).
A. Well, I think I lived by Gilmore station, on a farm. I do not know for sure where we were first. If you give me time to think I could think where we lived before, if you want to know it bad.
Q. How often did you see this land that they called Oakhurst before the time you went to live on Pacific street?
A. I could not tell you.
Q. You did not know much about it before that time?
A. I have been there a good many times—been there a great many times—just passed around the land and came on it sometimes, but I cannot tell you how many times.
Q. At the time you went there to live—when you lived eight years?
A. Yes, sir.
503 Q. There were not any streets graded through there, were there?
A. No, sir; not that I know of.
Q. There was no such avenue as Poppleton avenue known then, was there?
A. Well, Poppleton avenue did not run through there; no; but I suppose it was there, only the land was not surveyed at that time; it was wild.
Q. What was the character of the land when you first saw it? Was it timber land or what?
A. Most of it timber land. There was empty space on the west side—on the west end of it. There was a little spot with no timber on.
Q. How long was it covered with timber after you first knew it?
A. Well, the timber was taken off it while I lived there.
Q. When—what year was it taken off?
A. I do not know.
Q. You can't remember?
A. No, sir.
Q. What year was it that you remember of seeing this house that you say Aiken lived in first?

A. Well, I cannot tell you exactly what year that was.
Q. How long did Aiken live in the house?
A. I do not know.
Q. How long do you remember of seeing him there?
A. I think, to the best of my knowledge, he lived there pretty near a year or somewheres around that time.
Q. Who built the house he lived in?
A. I think he built it himself, as far as I know.
Q. How far north of the house that he lived in did you say the stable that they used was located?
A. I did not say how far; I do not know how far.
Q. Tell me how far.
A. I can't.
Q. Well, about how far?
A. I don't know; I never measured it?
Q. You cannot, then, judge how far.
A. No, sir; I cannot now. I could then by looking.

504 Q. Well, sir, the stable that you have talked about. Where was that located with reference to the house that Mr. Root now occupies on the land?

A. Well, I think it was pretty near up where Mr. Root's house now is, up on the hill. I don't know if it must be right up pretty near around in that neighborhood, as far as I know.
Q. Do you know where those two trees stand close to Mr. Root's house, south of it?
A. No, sir.
Q. How far south of this stable was it that the house that Aiken lived in stood?
A. I do not know.
Q. How wide is Poppleton avenue?
A. I could not tell you. I do not know much about the streets of Omaha, anyhow.
Q. Do you know where the house stands that Mr. Root lives in?
A. Know where it stands now?
Q. Yes.
A. That Mr. Root lives in?
Q. Yes.
A. Yes; I think I know where that is.
Q. How far is it from that house down to where the house stood that Aiken lived in?
A. I do not know, sir.
Q. How far according to your best judgment?
A. Well, I won't judge of that at all, for I cannot tell you how far.
Q. You do not know anything about how far south of it it was?
A. How far south? No. I cannot say how many feet it was or anything about it?
Q. At the time Aiken lived there there was not any such street as Poppleton avenue graded through there, was there?
A. No; not that I know of.

Q. Do you know where the south line of Poppleton avenue as graded is at the present time?

A. The south line of Poppleton avenue?

Q. Yes; as graded. Do you know where the south line of that grade is?

A. Yes, sir; I have seen as far south as they have graded; yes, sir.

505 Q. Now, how far south of the south line of that grade was it that the fence stood that you say Aiken built?

A. Well, the fence sets right up close to the grade; pretty near.

Q. Is that fence there now that Aiken built?

A. Yes, sir; most of it; some of it.

Q. How long since you saw it?

A. I do not remember it. It is not so very long ago.

Q. When did Aiken build it there—what year?

A. Why, I told you I don't know what year it was there, but he built it when he moved there.

Q. Did you see him build it?

A. Yes, sir.

Q. Now, you said something about there being a house in the southeast corner of these premises.

A. Yes, sir; there was.

Q. What kind of a house was that?

A. I could not remember what kind of a house it was, but I have seen the house.

Q. Were you ever alongside of it?

A. Yes, sir.

Q. About what size was it?

A. That I could not tell you, sir, what size it was. It seemed to me to be a little square house; maybe 16 by 16 or something like that.

Q. What kind of a roof did it have?

A. I do not know about the roof.

Q. Was there a barn or stable close to it?

A. Not that I can remember.

Q. Where did it stand with reference to Poppleton avenue?

A. Well, it stood—I think that stood nearer Pacific street than it did to Poppleton avenue.

Q. When was it that you saw that house there that you have reference to?

A. I do not know.

Q. What year?

A. I don't know what year. I told you that once.

Q. Well, did you see Poppleton avenue when it was graded—when it was being graded?

A. No; I was not over while they was grading it that I know of.

506 Q. Do you know what year it was graded in?

A. No, sir.

Q. Do you know where Mr. Syford lives?

A. No, sir.

Q. Do you know where Mr. Dickey lives?

A. I do not. I may, but I do not know the gentlemen by the name.

Q. Do you know the house standing on the east side of 33rd street, that has been built there some seven or eight years?

A. On 33rd and what?

Q. Right east of this land—right east of this Oakhurst land.

A. No, sir; I cannot. I don't know the gentlemen, I don't think.

Q. Have you ever been up and down 33rd street from the north line of this land—from Pacific street to Poppleton avenue?

A. Yes, sir.

Q. How long since?

A. I don't know as I—I think it is only about a month ago. I don't know for sure, but it is not a great length of time since.

Q. Well, but we will say three years ago—in 1886—did you go up and down that street?

A. In 1886?

Q. Yes.

A. Why, I could not tell you, but I passed up and down there since that time.

Q. You moved away from there in 1888. You moved away from where you lived on Pacific street in 1888, didn't you?

A. Yes, sir; I moved in 1888 away from there.

Q. Don't you remember of a new house being built on the east side of 33rd street, right east of this Oakhurst?

A. Yes, sir; there is a good many houses built there.

Q. Only right—one would be right pretty nearly opposite the center of it going from north to south?

A. I do not remember. I have seen them putting up several new houses there.

Q. Don't you remember of a house having been built there some seven or eight years ago that stood there a long time by itself before any other house was built on 33rd street, right east of this Oakhurst land?

507 A. No, sir; I can't remember it. I suppose—it is built up so much that I have forgotten about such things.

Q. Do you remember of a house being bu-lt three years ago, in the fall of 1886, pretty nearly the center going from north to south on this land on the east side of 33rd street—a cottage house?

A. I have most likely seen it, but I don't know. I could not tell you.

Q. I ask you about this for the purpose of directing your attention to a point where you say this building that you saw on these premises was located.

A. Yes, sir.

Q. Now, how far from that house north or south was it on this Oakhurst land that the building you saw was located?

A. Well, this house you are referring to—I do not know as I remember anything about that house. They have been building so much up there that I don't—I can't think of any of the houses you are referring to.

Q. You do not know any of the parties that lived in those houses?

A. I don't know. I am very little acquainted with any up there.

Q. How far south of Pacific street was it that this house that you say you saw on these premises stood?

A. Well, it was quite a ways, but I cannot tell.

Q. Was it half way from Pacific street down to Poppleton avenue?

A. It seemed like it was something around the middle of the place; in there somewheres. I don't know. I could not really say how near it was to either side, but I seen there was a house in there.

Q. How often did you pass that house?

A. I do not know.

Q. You do not know who lived there?

A. No, sir.

Q. Don't know who it was occupied by?

A. No, sir.

Q. Did you or not see another house on these premises, about 150 feet from the southeast corner of these premises, adjoining
508 Poppleton avenue, right directly north of Poppleton avenue, and a barn there in 1886 and 1887?

A. If there had I have forgotten about it.

Q. You do not remember anything about it?

A. I do not remember it; no, sir.

Q. Don't you remember of seeing a house there with a top bowed over like the top—like the hurricane deck—of a steamboat, standing there for some time—for a couple or three years—with a barn close to it?

A. No, sir; I cannot remember more than that one house there.

Q. How often were you along Poppleton avenue in 1886?

A. Something I don't know.

Q. Were you along there at all?

A. Yes; I was along there.

Q. In 1886—were you along 33rd street in 1886?

A. Yes, sir; I passed 33rd in 1886.

Q. Were you in 1887?

A. I think I was. I am not sure.

Q. Do you or do you not know that Poppleton avenue was graded through there in 1887?

A. I do not know what year it was in.

Q. You saw them when they were grading it, did you?

A. Yes, sir.

Redirect examination.

By Mr. POPPLETON:

Q. Where did you live when you herded cattle on this Oakhurst ground?

A. That is the time I lived on Mr. John I. Redick's place; lived with my father then.

Q. That was before you went to live on the place where you say you lived eight or ten years?

A. Yes, sir.

Q. In herding cattle what did you do on the Oakhurst place? Did you have a herd that you herded every day?

A. Yes, sir.

Q. How long?

A. Why, I herded part of two summers. I herded one whole summer, pretty near, and then I was there again a part of the second one.

Q. Then in herding you took out your stock in the morning and brought it back at night?

A. Yes, sir.

509 Q. Well, how often did you go over this place at that time?

A. Well, I could not tell you how often. I was not there every day, but I was there quite often, or near there.

Q. State whether you think it could be liable that there was any building there that you did not see and notice, passing it so frequently.

A. No; it was covered thick with timber at that time and I never saw no buildings at that time that I know of.

Q. When Aiken lived in the house that has been spoken of he cultivated quite a piece of land, didn't he?

A. Yes, sir; he cultivated some, I think.

Q. Where was that land—north or south of Poppleton avenue?

A. South.

Q. Who did it belong to?

A. I could not tell.

Q. Who claimed it? Who exercised control over it?

A. As far as I heard, a gentleman by the name of O'Brien, I think, at that time.

Recross-examination.

By Mr. COVELL:

Q. Do you mean to say that you herded cattle on this Oakhurst land?

A. No; I didn't really herd there, but I run up on the west end there; there is a piece of prairie and there was pretty nice grass.

Q. How many cattle did you have in that herd?

A. O, I had somewheres up along a hundred cattle, and sometimes they would stray over. I used to herd up on Mr.—what is Mr. Gallagher's land now. I used to herd there.

Q. What year was that?

A. I don't exactly know what year.

Q. As near as you can get at it.

A. I think it is about 11 years or so ago, and sometimes—you know it was laying all out in one prairie, and then they would go over farther and go over on this, what is called Oakhurst now; there

was a piece of prairie there on the west end; they would go there, too, and then went down toward the trees sometimes, too.

Q. How much prairie was there over on the west part of this ground.

510 A. Well, I should say only about—I don't know—about four or five acres or so. It is in grass, I think, clear across from Poppleton to Pacific street.

Q. The rest of it was all covered with timber and brush, wasn't it?

A. Heavy timber and brush; yes, sir.

H. RASMUSSEN.

(Witness excused.)

CHRIS. RASMUSSEN, called as a witness on the part of the plaintiff, being first duly sworn testified as follows:

Direct examination by Mr. POPPLETON:

Q. State your name.

A. Chris. Rasmussen.

Q. How long have you lived in Omaha?

A. I was only a couple of years out. I have been here 16 years, I think, in Douglas county; most of the time in Omaha.

Q. Have you ever lived in the neighborhood of this land called Oakhurst?

A. O, yes; I got my ground there yet.

Q. How many years?

A. I was now three years from the place. I think that will be eight years—for one month or for a year—eight years after I bought the place where I live now.

Q. Do you know a man named Aiken who lived up there?

A. O, yes; he was my neighbor at that time.

Q. Had you ever been to the house he lived in?

A. I was there lots of times.

Q. Did he cultivate any ground? Did he work any ground?

A. Yes, sir; he broke it up that year. That was prairie land. He broke it up and put corn in there that year I lived there.

Q. You broke it up for Aiken?

A. No, Aiken broke it up himself. He got two horses and broke it up. I saw him do it.

Q. And he planted corn?

A. Yes, sir; and some part of it potatoes, a piece of it.

Q. When Aiken lived there did you try to get that land?

A. Yes, sir.

511 Q. Whom did you try to lease it of?

A. Of O'Brien.

Q. General O'Brien?

A. Yes, sir.

Q. Did the ground you tried to lease of O'Brien include the house that Aiken lived in?

A. Ahugh (yes).

Q. What was the reason you did not get the lease?

Objected to by def't's counsel as incompetent, immaterial, and irrelevant.

Q. Now, you can answer.

A. The reason—I got that shanty. That was a rough building there—not very much rent. It was $18 to $20. I got that little fence around the ground. I rented t-e whole thing for $50. The lease on the ground was $25. I could get the whole thing for $75—pay $75. That was for the fence or the shanty. My nephew came down to O'Brien and he wanted to rent it only for one year and I didn't take it. That is all the reason about it.

Q. So you did not take it?

A. No. I would not pay $75 for one year for that small piece of ground.

Q. State whether you went to O'Brien with Aiken. Did Aiken take you down?

A. Yes; Aiken went in with me where we got a real-estate man along by the name of Peterson. He is a Danish fellow that was talking for me. He was with me and O'Brien there for to get the land.

Q. Whom did Aiken finally sell the improvements to—do you know?

A. A man came at that time he was in there and told him how to get a man that will pay $75. That is all I know about it.

Q. Did the ground that you tried to lease and that was occupied by Aiken include the house that Aiken lived in and the fence around the ground?

512 A. Yes, sir; that was what I paid the $50 for; that is the piece of land that I got there.

(Cross-examination waived.)

(Witness excused.)

Upon the back of said depositions appear endorsements in words and figures following, to wit: No. 212, M. Filed Nov. 14, 1889. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, at the November term of said court, on the 14th day of November, 1889, the following proceedings were had and done in said cause as appears of record on folio 757, Journal "N" of said court, to wit:

JAMES M. WOOLWORTH
vs.
ALLEN ROOT. } Cause Submitted. 212, M.

This cause coming on for hearing was argued and submitted to the court on its merits by solicitors for the respective parties, whereupon the court takes the same under consideration.

Thereupon, afterwards, to wit, on the 26th day of December, 1889, opinion was filed in said case; which said opinion is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

JAMES M. WOOLWORTH
vs.
ALLEN ROOT.

Opinion.

BREWER, *D. J.*:

This is a bill to carry into effect a decree of this court. In a general way these may be stated as the facts: On August 27, 1870, Oliver P. Morton, claiming to be the owner of a certain tract of land, began a suit in this court against Allen Root, this de-
513 fendant, to quiet title. On May 8th, 1873, a decree was entered declaring that Root had no title and quieting the title in complainant, directing Root to make a deed to complainant, and, in case of his failure, appointing Watson B. Smith as special master, and directing him to execute such a deed. Allen Root, the defendant, did not make the deed as directed, and on July 4th, 1873, Watson B. Smith, special master, made a deed to complainant Oliver P. Morton. On June 24th, 1873, after the date of the decree, complainant Oliver P. Morton and wife deeded to the present complainant, James M. Woolworth, an undivided one-half. On the same day he conveyed the other undivided one-half to William S. T. Morton, and on June 4th, 1879, the executors and executrix of William S. T. Morton, deceased, conveyed that undivided one-half to the complainant James M. Woolworth.

The present complainant by this supplemental bill shows that he has succeeded to all the rights and title of Oliver P. Morton; that defendant, notwithstanding the decree against him, is asserting title and has entered into possession of the real estate and prays for a writ to oust him from possession and to put complainant in, and also for an injunction restraining the defendant from asserting any right in or to the premises or from occupying the same or any part thereof.

Several questions have been raised and argued with great learning by counsel. It appears that Oliver P. Morton prior to the commencement of this suit had executed a deed to Wm. S. T. Morton, which deed was dated August 19th, 1869, and recorded September 15th, 1869, in the records of this county; and it is claimed that Oliver P. Morton, therefore, had no title when he filed the bill, and that the decree was obtained by fraud upon the court; that the defendant was not aware of the condition of the title at the time of the suit and decree, and is therefore not now precluded from raising the question. Whatever actual knowledge the defendant may have had from Oliver P. and William S. T. Morton, the deed was recorded and there-
514 fore implied notice, and Root is concluded by a decree against him divesting his title and vesting it in Oliver P. Morton. But, further, the evidence shows that prior to filing the bill William S. T. Morton, the brother of Oliver, called on Mr. Woolworth, the present complainant, with reference to the title of this property and other litigations; that he produced a writing signed by

the two brothers, the effect of which was to revest the title in Oliver P. Morton; that, by direction of William S. T. Morton, Mr. Woolworth brought the suit in the name of Oliver; that afterwards Oliver confirmed all that had been stated, and that after the decree of 1873 William was here and settled with Mr. Woolworth for his services in that case and other matters, and agreed that Oliver should convey to Woolworth, as was done, an undivided one-half of the premises. This testimony does away with all suggestion of fraud or wrong. The title which the Morton brothers claimed was different from the one which defendant claimed, and it was a matter which did not concern him in whose name the suit was brought, providing only a decree could be obtained binding as to the respective titles. When his title was declared bad and theirs good it was a matter entirely immaterial to him in whose name the decree was rendered. As to Oliver and William, each assented to the proceeding as it was had. Each understood that it was a decree affirming the title which they claimed, and they dealt with the property after the decree as though the title was really in Oliver and not in William. Some question was made as to the sufficiency of the deed from Oliver to William in August, 1869, because there were no witnesses to it. But I put no stress upon that. The legal title was doubtless conveyed by that deed. The two brothers assented to the suit in the name of Oliver, had signed papers purporting to revest the title, and after the decree recognized the title as in Oliver. There was no wrong or fraud in this, and equity
515 sees nothing of which the defendant can now avail himself to justify his attempt to avoid the effect of that decree.

Again, it is insisted by the defendant that the deed from the executors of Wm. S. T. Morton failed to transfer any title because the sale was not made under the directions of the probate court of this county or in compliance with the laws of this State with regard to the sales of real estate of deceased persons. Any failure in this deed would not, of course, interfere with the transfer of title by deed from Oliver P. Morton directly to the present complainant, and I know of no reason why such present complainant could not invoke the benefit of this decree ever to protect a one-half interest. But is the deed from the executors incompetent to transfer title? The will was duly probated in Indiana, where the testator resided, and thereafter a copy of the will was filed in the county court of this county and duly admitted to probate. The will not only gives general powers to the executors to execute the will, but specifically provides that they be fully authorized and empowered "to grant bargain, sell and convey, and if necessary to mortgage any and all my real estate and deeds releases and mortgages to make and acknowledge as fully and amply as I could do were I living." Now, this language in the will grants to the executors a power under which they can convey after the probating of the will, although no previous license was obtained from the probate courts. See Clark *vs.* Tainter, 7 Cush., 567; Conklin *vs.* Egerton Adm'rs, 21 Wend., 429, & cases cited; Newton *vs.* Bronson, 13 N. Y., 587. In which it is held that an executor is incompetent to act as such beyond the jurisdiction in which

he is appointed, but that if he be a donee of a power of sale contained in the will he may execute the power beyond the jurisdiction because he acts in conveying the land as a devisee of a power created by the owner of the estate and not under authority conferred by the surrogate.

Finally, defendant insists he has acquired the title by possession for more than ten years, and alleges that for more than 19
516 years last past he has been in the actual, open, notorious, exclusive, and adverse possession of all of the real estate, and by the testimony he introduces he endeavors to substantiate this claim. He says that he entered into possession in 1879, and has ever since been in possession. He does not pretend that the character of his possession has changed or that any notice was ever given to the Mortons or to this complainant of the title or claim under which he was holding possession since the date of the decree. In other words, he puts before the court a continuous possession, commencing in 1859, before the rendering of the decree, and lasting until the present time, with no change in the circumstances of such possession and no notice to the complainant since that decree. Now, if the testimony sustained this allegation of possession open, continuous, and exclusive (and it comes very far short of it) it would not avail the defendant aught. By the decree and the deed made in pursuance of it all title and right of possession in Root was transferred to complainant. They were equivalent to a voluntary conveyance by him to Morton. Under these circumstances no retention of possession was adverse to the title conveyed, and he could not bolster up a title based upon that possession until he had first given notice of his intention to claim adversely. These are the substantial questions, and must be resolved in favor of the present complainant. When the matter was before me on demurrer I ruled that this proceeding could be maintained, and that by this supplemental bill complainant has a right to execute the decree. I see no necessity of reconsidering that question. I understand the rule in equity to be that when once a decree has been rendered the benefit of that decree can be obtained not merely by the complainant, but by those holding under him. It would be strange that after a decree had been rendered to quiet a complainant's title any heir, devisee, or grantee from him should be put to the necessity of an independent suit for the purposes of securing the benefits of that
517 adjudication. When the decree was rendered establishing the title of Morton and quieting it as against any claim of defendant, that was an adjudication which defendant was bound to accept as final unless by suitable proceedings in appeal he succeeded in reversing the decree. Instead of pursuing his legal remedy by appeal, he has sought in this indirect way to set aside that decree. Equity will tolerate no such proceedings. A decree will be entered, as prayed for, enjoining him from setting up any claim to this property, and directing the marshal to put him out of possession and restore possession to plaintiff.

Upon the back of said opinion appear endorsements in words and figures following, to wit: No. 212, M. U. S. circuit court, district of

Nebraska. James M. Woolworth *vs.* Allen Root. Opinion. Filed Dec. 26, 1889. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, at the said November term of said court, on the said 26th day of December, 1889, the following proceedings were had and done in said cause, as appears of record on folio 36, Journal "O" of said court, to wit:

JAMES M. WOOLWORTH
vs.
ALLEN ROOT. } 212, M. Decree.

This cause came on to be heard upon the pleadings, depositions, and exhibits and was argued by counsel, and thereupon it was ordered, adjudged, and decreed as follows:

First. It is hereby declared that the plaintiff has by divers conveyances succeeded to the title of Oliver P. Morton, the plaintiff in the original bill exhibited in this court by him against Allen Root, the defendant herein, and that the said plaintiff is entitled to the benefit of the decree of this court, bearing date the 8th of May, 1873, rendered in the said suit and to have the same carried into execution.

518 Second. It is hereby further declared that the defendant has not and never had any interest in the premises in the said decree and the supplemental bill filed in this suit and hereinafter described or any part thereof, and that the possession of the said premises by him alleged in his answer in this suit is and since the decree of this court hereinbefore mentioned has been subject to the title in and by the said decree adjudged to and quieted in the said Oliver P. Morton, and that the pretense of possession adverse to that of the plaintiff herein alleged by the said defendant in his said answer is against and in violation of the said decree.

Third. It is hereby ordered, adjudged, and decreed that the injunction issued out of this court at the filing of this supplemental bill, enjoining and restraining the said defendant, his agents, attorneys, solicitors, and counsellors, from asserting any right, title, or interest in the said premises or any part thereof, and from occupying the same or any part thereof or leasing or pretending to lease to others the same or any part thereof or under any pretense whatever admitting any party into or upon the said premises or any part or parcel thereof or making any verbal or written contract, lease, deed, or conveyance to any person or persons, party or parties, purporting to affect the title to said premises or any part thereof, and from excluding the plaintiff from the said premises or any part thereof or preventing the said plaintiff from taking sole and exclusive possession of the same, and from bringing any action or actions touching the title to or possession of the said premises, be, and the same is hereby, made perpetual; and it is further ordered that a writ of perpetual injunction issue out of this court and under the seal thereof, directed to the said defendant, his agents, attorneys, solicitors, and counsellors, commanding and enjoining him and them and each and every of them as in and by the said pro-

visional injunction was commanded and enjoined and hereinbefore recited.

519 Fourth. It is further ordered, adjudged, and decreed that a writ of possession issue out of this court and under the seal thereof, directed to the marshal, commanding him to sum-arily remove said defendant, his tenant-, agents, and all persons holding or claiming to hold under him, from the said premises and every part thereof, and to deliver possession of the said premises and every part thereof to the said plaintiff.

Fifth. It is further ordered, adjudged, and decreed that the said plaintiff have and recover from the said defendant the costs of this suit, to be taxed, and that execution issue therefor. The premises hereinbefore referred to are known and described as follows:

All that certain piece or parcel of land, being part of section twenty-eight (28), in township fifteen (15) north, range thirteen (13) east, of the 6th principal meridian, in the city of Omaha and county of Douglas and State of Nebraska, described as follows: Beginning at the northwest corner of said section twenty-eight (28), thence south along the west line of said section eight (8) chains and five (5) links, thence east eighty-five (85) degrees east along the center line of Poppleton avenue to the center of Thirty-third (33) street, in said city, thence north along the center of said Thirty-three (33) street to the north line of said section nine (9) chains and seventy (70) links, thence west along the said north line of said section twenty (20) chains to the place of beginning.

Thereupon the defendant prayed an appeal to the Supreme Court, which is allowed, and the amount of supersedeas bond is fixed at $8,000.00.

(S'g'd) DAVID J. BREWER,
Circuit Judge.

520 Thereupon, afterwards, to wit, on the 7th day of January, 1890, a supersedeas bond was filed in said case; which said bond is in words and figures following, to wit:

Know all men by these presents that we, Allen Root, as principal, and Geo. W. Hopper and Jonathan F. Gardner, as sureties, of Douglas county, Nebraska, are held and firmly bound unto James M. Woolworth, of Omaha, Douglas county, Nebraska, in the full and just sum of eight thousand ($8,000) dollars, to be paid to the said James M. Woolworth, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fourth day of January, in the year of our Lord one thousand eight hundred and ninety (1890).

Whereas lately, at a circuit court of the United States for the district of Nebraska, in a suit depending in said court between James M. Woolworth, complainant, and Allen Root, defendant, a decree was rendered against the said Allen Root, defendant in said suit, and the said Allen Root having prayed an appeal from said decree, and such appeal having been allowed, and having obtained an order of

appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said James M. Woolworth, citing and admonishing — to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of October next:

Now, the condition of the above obligation is such that if the said Allen Root shall prosecute his appeal to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

ALLEN ROOT.
GEO. W. HOPPER.
JONATHAN F. GARDNER.

Approved by—
ELMER S. DUNDY, *Judge.*

7 Jan., 1890.

[Endorsed:] No. 212. M. United States circuit court, district of Nebraska. James M. Woolworth *vs.* Allen Root. Bond. Filed Jan. 7, 1890. Elmer D. Frank, clerk.

521 Thereupon, afterwards, to wit, on the 17th day of February, 1890, a citation was filed in said case, the following of which is the original:

THE UNITED STATES OF AMERICA, *District of Nebraska,* } *ss:*

To James M. Woolworth, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of October next, pursuant to an appeal from a decree filed in the clerk's office of the circuit court of the United States for the district of Nebraska, wherein Allen Root is appellant and you, James M. Woolworth, are appellee, to show cause, if any there be, why the decree in No. 212, M, rendered against the said appellant, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Omaha, this fourth day of January, 1890.

DAVID J. BREWER, *Judge.*

522 [Endorsed:] No. 212, M. United States circuit court, district of Nebraska. James M. Woolworth *vs.* Allen Root. Citation. Filed Feb. 17, 1890. E. D. Frank, clerk. Service admitted Feb'y 17, '90. J. M. Woolworth.
$2.00 pd.

Marshal's Costs.

Service	2
Mileage	06
R. R. fare	
Use of team	
Subsistance	
Total	$2 06

523 UNITED STATES OF AMERICA, *District of Nebraska,* } *ss:*

I, Elmer D. Frank, clerk of the circuit court of the United States for the eighth judicial circuit and district of Nebraska, certify that the foregoing folios, from one to 521, contain true and faithful transcripts of the pleadings, process, and proceedings of record and on file in my office as said clerk and the whole thereof and the endorsements thereon in the case of James M. Woolworth *vs.* Allen Root, and that a copy of the citation has been lodged and remains in my office in said case.

Seal United States Circuit Court, District Nebraska.

Witness my hand and the seal of said circuit court, at Omaha, Nebraska, this 17th day of February, A. D. 1890.

ELMER D. FRANK, *Clerk.*

524 In the Supreme Court of the United States of America, for the October Term, in the year of our Lord one thousand eight hundred and ninety.

ALLEN ROOT, Appellant,
vs.
JAMES M. WOOLWORTH, Appellee. } In Equity. On Appeal. No. 1569.

Style of the case in the United States circuit court for the district of Nebraska is:

JAMES M. WOOLWORTH, Complainant,
vs.
ALLEN ROOT, Defendant. } No. 212, M.

Assignment of Errors.

Now comes the said Allen Root, appellant, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, in the District of Columbia, by Upton M. Young and George W. Covell, his attorneys and solicitors, and says that in the record and proceedings aforesaid there are manifest errors in this, to wit:

I.

That the bill in equity filed in the case aforesaid in the United States circuit court for the district of Nebraska by James
525 M. Woolworth against Allen Root and the matters therein contained are not sufficient in law for the said James M.

Woolworth, complainant, to have or maintain his aforesaid action thereof and against the said Allen Root.

II.

That the said circuit court of the United States for the district of Nebraska erred in not sustaining the demurrer of the defendant, Allen Root, to the bill of complaint of James M. Woolworth, complainant, the grounds and causes of which demurrer are as follows:

1. That the said plaintiff has not in and by his said bill made and stated such a case as doth and ought to entitle him to any such relief as is thereby sought or prayed for from or against this defendant.

2. That this court has no jurisdiction of the person of this defendant or of the subject of this action, as it appears on the face of said bill that plaintiff and defendant are both citizens of the State of Nebraska.

3. That it appears on the face of complainant's bill that he has an adequate remedy at law and is not entitled to maintain this action in equity.

4. That the said plaintiff's bill does not state facts sufficient to constitute a cause of action in favor of plaintiff and against this defendant.

III.

526 That the said circuit court for said district erred in admitting in evidence and considering the deed from Thomas McCullough, Eliza M. Morton, and William A. Peele, executors of the will and estate of William S. T. Morton (deceased), marked Exhibit "S S" of complainant's testimony.

IV.

The said circuit court aforesaid erred in admitting in evidence and considering the deed from Oliver P. Morton and wife to James M. Woolworth, marked Exhibit "T T" of complainant's testimony.

V.

The said circuit court for the said district erred in admitting in evidence and considering the confirmatory deed made by Thomas McCullough and William A. Peele, two of the executors of the will and estate of William S. T. Morton (deceased), marked Exhibit "U U" of complainant's testimony.

VI.

The said circuit court erred in admitting in evidence and considering the certified transcript of the pleadings, proceedings, record, and decree of the district court in and for the Territory of Nebraska in the case of Oliver P. Morton *vs.* Roswell G. Pierce, Heman Glass, *et al.*, of complainant's testimony.

VII.

That the said circuit court for said district erred in admitting in evidence and considering the certified transcript of the pleadings, proceedings, record, testimony, the opinion of Circuit Judge Dillon, and the decree of the United States circuit court in the case of Oliver P. Morton, complainant, *vs.* Allen Root, defendant, from the circuit court of the United States for said district, of complainant's testimony.

527

VIII.

The said circuit court for said district erred in admitting in evidence and considering the testimony of James M. Woolworth, complainant, from question number 216, to number 218, inclusive, of said complainant's testimony, and erred in overruling defendant's objections to said testimony, as shown by the record, and in overruling the defendant's motion to strike out of the record the said testimony of James M. Woolworth.

IX.

The said circuit court for said district erred in entering its decree as follows:

"First. It is hereby declared that the plaintiff has by divers conveyances succeeded to the title of Oliver P. Morton, the plaintiff in the original bill exhibited in this court by him against Allen Root, the defendant herein, and that the said plaintiff is entitled to the benefit of the decree of this court, bearing date the 8th of May, 1873, rendered in the said suit and to have the same carried into execution."

X.

The said circuit court for said district erred in entering its decree as follows:

"Second. It is hereby further declared that the defendant has not and never had any interest in the premises in the said decree and the supplemental bill filed in this suit and hereinafter described or any part thereof, and that the possession of the said premises by him alleged in his answer in this suit is and since the decree of this court hereinbefore mentioned has been subject to the title in and by the said decree adjudged to and quieted in the said Oliver P. Morton, and that the pretense of possession adverse to that of the plaintiff herein alleged by the said defendant in his said answer is against and in violation of the said decree."

528

XI.

The said circuit court for said district erred in entering its decree as follows:

"Third. It is hereby ordered, adjudged, and decreed that the injunction issued out of this court at the filing of this supplemental

bill, enjoining and restraining the said defendant, his agents, attorneys, solicitors, and counsellors, from asserting any right, title, or interest in the said premises or any part thereof, and from occupying the same or any part thereof or leasing or pretending to lease to others the same or any part thereof or under any pretense whatever admitting any party into or upon the said premises or any part or parcel thereof or making any verbal or written contract, lease, deed, or conveyance to any person or persons, party or parties, purporting to affect the title to said premises or any part thereof, and from excluding the plaintiff from the said premises or
529 any part thereof or preventing the said plaintiff from taking sole and exclusive possession of the same, and from bringing any action or actions touching the title to or possession of the said premises, be, and the same is hereby, made perpetual; and it is further ordered that a writ of perpetual injunction issue out of this court and under the seal thereof, directed to the said defendant, his agents, attorneys, solicitors, and counsellors, commanding and enjoining him and them and each and every of them as in and by the said provisional injunction was commanded and enjoined and hereinbefore recited."

XII.

The said circuit court for said district erred in entering its decree as follows:

"Fourth. It is further ordered, adjudged, and decreed that a writ of possession issue out of this court and under the seal thereof, directed to the marshal, commanding him to summarily remove said defendant, his tenants, agents, and all persons holding or claiming to hold under him, from the said premises and every part thereof and to deliver possession of the said premises and every part thereof to the said plaintiff."

XIII.

The said circuit court for said district erred in entering its decree as follows:

"Fifth. It is further ordered, adjudged, and decredd that the said plaintiff have and recover from the said defendant the costs of this suit, to be taxed, and that execution issue therefor. The
530 premises hereinbefore referred to are known and described as follows:

All that certain piece or parcel of land, being part of section twenty-eight (28), in township fifteen (15) north, range thirteen (13) east, of the 6th principal meridian, in the city of Omaha and county of Douglas and State of Nebraska, described as follows:

Beginning at the northwest corner of said section twenty-eight (28), thence south along the west line of said section eight (8) chains and five (5) links, thence east eighty-five (85) degrees east along the center line of Poppleton avenue to the center of Thirty-third (33) street, in said city, thence north along the center of said Thirty-third street to the north line of said section nine (9) chains and seventy

(70) links, thence west along the said north line of said section twenty (20) chains to the place of beginning."

And the said Allen Root, appellant in this court, prays that the decree aforesaid may be reversed, annulled, and altogether held for naught, and that he may be restored to all things which he hath lost by the occasion of the said decree.

UPTON M. YOUNG,
GEORGE W. COVELL,
Attorneys and Solicitors for Allen Root, Appellant.

531 [Endorsed:] No. 1569. In the Supreme Court of the United States of America. 1889, Oct'r term. Allen Root, appellant, *vs.* James M. Woolworth, appellee. Assignment of errors. Filed April 26, 1890.

Endorsed on cover: Case No. 13,976. Nebraska C. C. U. S. No. 316. Allen Root, appellant, *vs.* James M. Woolworth. Filed February 25, 1890.

150-401

UNITED STATES SUPREME COURT

ALLEN ROOT,

Appellant,

v.

JAMES M. WOOLWORTH.

MOTION AND PAPERS TO SUPPLY RECORD.

ACKERMAN, DUER & KELTZE, PRINTERS, OMAHA.

IN THE SUPREME COURT OF THE UNITED STATES.

ALLEN ROOT, *Appellant.*

v.

JAMES M. WOOLWORTH.

Now comes the appellee in the above entitled suit and suggests that certain exhibits, copies of which are hereto annexed, and which were introduced in evidence in his behalf on the hearing of the said suit in the Circuit Court, have been omitted from the transcript of the record of said Court filed in this Court; that the defect in the record here escaped the notice of said appellee, because reference was made thereto in the transcript which mislead him; that hereto annexed is a stipulation which was signed by the counsel for the appellant in order to supply the said omissions, page 22 of the Motion Papers.

Said appellee now here moves the Court to award to him a writ of *certiorari* to the said Circuit Court commanding the sending to this Court of copies of the said omitted exhibits to the end that the same may be made parts of the record in this Court, or to make such other order in that behalf as may be proper.

BURTON N. HARRISON,
of Counsel for Appellee.

UNITED STATES OF AMERICA, } ss.
District of Nebraska. }

Pleas before the Honorable David J. Brewer, Judge of the Circuit Court of the United States, for the Eighth Judicial Circuit sitting in the Circuit Court for the District of Nebraska at the Term of November, 1889, and on the 26th day of December of the said term.

JAMES M. WOOLWORTH,

v

ALLEN ROOT.

BE IT REMEMBERED that upon the hearing of said suit there was read in evidence, and remains on file in the office of the Clerk of the said Court, the exhibits following, that is to say:

CERTIFICATE OF COUNTY JUDGE.

STATE OF NEBRASKA, } ss.
County of Douglas. }

I, G. W. Shields, County Judge for said County, do hereby certify that I have compared the following copy of an authenticated copy of the "Last Will of Wm. S. T. Morton of the Probate thereof and of the letters Testamentary issued thereon" in the County of Wayne and State of Indiana, and the Decree and Certificate of County Judge Douglas County, with the original Record thereof, now remaining in this office, and have found the same to be a correct Transcript

therefrom, and of the whole of such original Record, and I further certify that the Records of said matter disclose that no further proceedings were had in said matter after the probating of said Will.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the County Court, at Omaha, this first day of April, 1889.

G. W. Shields,
County Judge.

State of Nebraska, } ss.
Douglas County. }

At a term of County Court held in and for the County of Douglas in the City of Omaha on the 22nd day of April, A. D., 1876.

Present, C. H. Sedgwick, County Judge. In the matter of the estate of W. S. T. Morton, deceased.

DECREE.

Be It Remembered that on the 15th day of March, A. D., 1876, William A. Peele filed his duly verified petition praying that all persons interested in the estate of said W. S. T. Morton, deceased, be cited as by law required to show cause why the duly authenticated copy of the last will and testament of said deceased, which was on said last mentioned day in said Court filed, should not be allowed and probated and established as such last will and testament of said deceased in the County Court of Douglas County. That in and by said petition it appeared that William S. T. Morton departed this life in Wayne County, State of Indiana, April 30th, 1875, leaving a last will and testament

which was duly allowed and probated in said County of Wayne. That said deceased was possessed of real estate of about the value of Two Thousand Dollars, situate in Douglas County and State of Nebraska, to be administered; that the names and residence of heirs at law and persons interested in the estate of said deceased are as follows: Eliza M. Morton, his widow, William Throch Morton, aged eighteen years, James Throch Morton, aged fourteen years, and Clara Throch Morton, aged twelve years, children of said deceased, all residing in said Wayne County.

That upon reading and filing said petition and said duly authenticated copy of the last will and testament of said deceased such proceedings were had that an order was issued out of and under the seal of said County Court as prayed for, citing all persons in interest to appear at a term of said Court, to be held at the County Court room, in the City of Omaha, on the 13th day of April, A. D., 1876, at 9 o'clock, a. m., of that day and show cause why the prayer of said petitioner should not be granted and said will probated and allowed and established; and that notice of the pendency of said petition and the hearing thereunder be given to all parties in interest by publishing a copy of the order in the Omaha Weekly *Bee*, a newspaper printed and of general circulation in said Douglas County, for three successive weeks prior to said day of hearing.

That thereafter and on the 13th day of April, A. D., 1876, and at the hour and place assigned for such hearing no one appeared to contest the allowance and probate of such will and the said hearing was continued

to the 22d day of April, A. D., 1876, to accomodate the Court. That on said last mentioned day due proof of the publication of the order of hearing was made by affidavit on that day filed with the Court, said proof being made in the manner and form prescribed by law. And such proceedings were thereupon had that the said Court took the proof hereinafter set fourth and then and there adjudged and decreed and does hereby adjudge and decree that the said last will and testament of said deceased is approved, allowed and established and shall have full force and effect in the State of Nebraska as and for the last will and testament of said deceased and that the said authenticated copy be duly recorded in said County Court, and said Court did thereupon and then and there cause a certificate of such proof to be endorsed upon such duly authenticated copy signed by the Judge of said County Court of Douglas County and attested by his seal which said authenticated copy (containing the proof aforesaid) and said certificate are in the words and figures following, that is to say:

STATE OF INDIANA, }
Wayne County. } ss.

I, Wm. H. Lynde, Clerk of the Circuit Court for the County of Wayne, in the State of Indiana, do certify the annexed to be a true copy of the last will of Wm. S. T. Morton, late of said County, deceased, and of the Certificate of Probate, as endorsed thereon; and Eliza M. Morton, Thomas McCullough and Wm. A. Peele, having duly qualified and given bond as required

by law, as executors duly authorized to take upon themselves the administration of said estate according to such will.

WITNESS my hand and the Seal of said Court, this 14th day of May, 1875.

[SEAL] WM. H. LYNDE,
Clerk Wayne Circuit Court.

In the name of our Heavenly Father, I, William S. T. Morton, of Wayne County and State of Indiana, being in feeble health but of sound disposing mind and memory, and knowing the certainty of death, but the uncertainty when it will take place, and being anxious while able to do so, to direct and dispose of such property as I may be possessed of at the time of my demise, I make and publish this my last will and testament, revoking any and all wills by me at any time heretofore made.

Item 1st. I direct that my body be decently interred in a manner corresponding with my circumstances and situation in life, and my spirit I pray may be returned to the God that gave it.

Item 2nd. I direct that all my just debts and funeral expenses be paid by my executors out of the first money that shall come into their hands out of my estate.

Item 3d. After the payment of my said debts and funeral expenses, I will and direct that my son James Throck Morton and my daughter Clara Throck Morton have each five hundred dollars for their education and support, to be applied under the direction of whomso-

ever may have their control and direction, to be paid by my executors when the same may be needed for the purposes aforesaid. And when my said daughter Clara Throck Morton arrives at the full age of maturity I bequeath to her the sum of One Thousand Dollars in view of her helplessness growing out of her sex; to be hers absolutely and not subject to the control or direction of any husband or any other person than herself; and in case of the death of said James or of said Clara before the said bequests, or any or either of them, shall be applied, or any part thereof, then and in that case, the part or parts remaining shall be and become parts and parcels of my estate as though said bequests had not been made.

Item 4th. As to the residue of my estate of every kind and description, real and personal, I will and direct, bequeath and devise the same to my beloved and faithful wife, Eliza M. Morton, for and during her natural life; and at her death I will, direct, bequeath and devise the same in equal parts to my three children, William Throck Morton, James Throck Morton, and Clara Throck Morton; and in the case of the death of either or any one of said children without issue before the death of my wife, his, her or their share or shares shall descend to the survivors.

Item 5th. I direct and fully authorize and empower my executors, or such of them as shall qualify, to sell and dispose of any personal property and effects, or such parts as they may deem advisable at such time or times and on such terms as they may think for the best interest of my estate and the best interest

of my creditors, giving such notice of sale and taking such security as will, in their judgment, best secure and protect all parties interested. And until the same can be sold, I devise that my executors take charge of and control of my business interests and conduct the same as they may think for the mutual interest of my estate and my creditors.

Item 6th. Our home farm, situate adjoining the town of Centreville, in said Wayne County, and which is owned and held by my beloved wife, I desire shall be released of liens and encumbrances by my said executors, that all such liens and encumbrances shall be paid off and discharged from the proceeds of the sales of the other property, or from money that may otherwise come into the hands of my executors, and my request is that said farm shall prepetually remain in the family I leave behind me.

Item 7th. I hereby and herein fully authorize and empower my executors hereinafter named, or such of them as shall qualify, to collect all my debts, compromise and compound with my debtors and my creditors in such manner as they may think for the best interest of my estate and all parties interested, and to grant, bargain, sell and convey and if needs be to mortgage any and all my real estate, and deeds, releases and mortgages to make and acknowledge as amply and fully as I could do were I living.

Item 8th. I hereby nominate and appoint my beloved wife, Eliza M. Morton, and my friends Thomas McCullough and William Peele, executors of this my last will and testament.

Given under my hand and seal this April the 7th, 1875.

WILLIAM S. T. MORTON. [SEAL]

Signed by said William S. T. Morton in our presence, and signed by us in his presence as witnesses, and at his request, and in the presence of each other.

ADAM TRUNBULL.
THOMAS WILSON.

STATE OF INDIANA, }
Wayne County. } ss.

Before me, Wm. H. Lynde, Clerk of the Wayne Circuit Court, personally came Adam Trunbull and Thomas Wilson the subscribing witnesses to the foregoing last will and testament of William S. T. Morton, late of Wayne County, Indiana, deceased, and being duly sworn on oath say that they were present at the execution of said last will; that the same was duly executed; that at the time of the execution thereof said testator was of full age to devise his property, of sound mind and memory and not under any coercion or restraint; that said testator requested them to sign said will as witnesses thereto, which they accordingly did in the presence of said testator and in the presence of each other as subscribing witnesses thereto.

ADAM TRUNBULL.
THOMAS WILSON.

Subscribed and sworn to before me this 3d day of May, 1875.

WM. H. LYNDE,
Clerk.

STATE OF INDIANA, } ss.
Wayne County. }

I, Wm. H. Lynde, Clerk of the Wayne Circuit Court, do hereby certify that the above and foregoing last will and testament of William S. T. Morton, late of Wayne County, State of Indiana, deceased, was this day duly admitted to probate and record, and the proof thereof duly made by Adam Trunbull and Thomas Wilson, the subscribing witnesses thereto, which said will, together with such proof, have been duly recorded in Record of Will No. 6, Page 138, in this office.

WITNESS my hand and the Seal of said Court this 3d day of May, 1875.

[SEAL] WM. H. LYNDE,
Clerk.

STATE OF INDIANA, } ss.
Wayne County. }

I, Wm. H. Lynde, Clerk of the Wayne Circuit Court hereby certify that the foregoing are true and correct copies of the Will of Wm. S. T. Morton, late of said County and State aforesaid, deceased, of the Probate thereof and of the letters Testamentary issued thereon as the same appear of record and on file in my office.

WITNESS my hand and the seal of said Court at the City of Richmond, County and State aforesaid, this 18th day of December, 1875.

[SEAL] WM. H. LYNDE,
Clerk W. C. C.

STATE OF NEBRASKA, }
Douglas County, } ss.

BE IT REMEMBERED, that at a session of the County Court of Douglas County, held in and for said County, on the 22d day of April, A. D., 1876, the last will and testament of W. S. T. Morton, late of the County of Wayne, and State of Indiana, deceased, was duly proved, allowed, probated and established according to law, as and for the last will and testament of said deceased, upon the probate thereof as proved and allowed in the said County of Wayne and State of Indiana, which said duly authenticated copy with this certificate are on file and of record in this said County Court.

IN TESTIMONY WHEREOF, I have hereunto set my hand and the Official seal of said County Court, this 22d day of April, A. D., 1876.

C. H. SEDGWICK,
County Judge.

[SEAL]

UNITED STATES OF AMERICA, }
District of Nebraska, } ss.

I, Elmer D. Frank, Clerk of the Circuit Court of the United States for the District of Nebraska, certify that I have compared the annexed copy of Probate of the last will of Wm. S. T. Morton in the case of J. M. Woolworth vs. Allen Root, with the original on file in this office, and that the same is a correct transcript thereof, and of the whole of said original.

In Testimony Whereof, I have caused the seal of said Court to be hereunto affixed at the City of Omaha, in said District, this 19th day of October, 1893.

Elmer D. Frank,
Clerk.

CERTIFICATE OF COUNTY JUDGE.

State of Nebraska, } ss.
County of Douglas. }

I, G. W. Shields, County Judge for said County, do hereby certify that I have compared the following copy of The "Letter Testamentary" granted April 27th, 1889, to Thomas McCullough and William A. Peele, in re-estate of Wm. S. T. Morton, deceased, with the original Record thereof, now remaining in this office, and have found the same to be a correct Transcript therefrom and of the whole of such original Record.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the County Court, at Omaha, Nebraska, this 8th day of June, 1889.

[Seal] G. W. Shields,
County Judge.

STATE OF NEBRASKA, }
County of Douglas. } ss.

The State of Nebraska, to Thomas McCullough and William A. Peele, GREETING:

WHEREAS, William S. T. Morton departed this life testate, being at or immediately previous to his death, an inhabitant of the County of Wayne, in the State of Indiana, and having while he lived, and at the time of his demise, estate with the said County of Douglas to be administered; and whereas, at a session of said County Court holden at Omaha in said County, on the 27th day of April, in the year of Our Lord, one thousand eight hundred and seventy-six.

A copy of said Will and the probate thereof in Circuit Court of Wayne County, in the State of Indiana, duly authenticated, were produced to said County Court and the said will was approved and allowed in this State.

And whereas, no letters testamentary were issued, and whereas on the first day of April, 1889, you filed your duly verefied petition praying that letters testamentary issued herein to you; and whereas, on the said first day of April, 1889, this Court issued an order fixing the 27th day of April, 1889, at 9 o'clock a. m., for the hearing of said petition, and ordered that said order be published for three consecutive weeks before said day of hearing in the Omaha Weekly *Herald;* and whereas it appears by affidavit on file that said order and notice have been duly published as required thereby

And whereas, in and by said Will you and Eliza M. Morton were appointed executors thereof. You and the said Eliza both took upon you the execution of said trust, but the said Eliza has ceased to be executrix of the said will.

Now Therefore, trusting in your care and fidelity, I do, by these presents commit unto you the said Thomas McCullough and William A. Peele, full power to administer and faithfully dispose of, according to law and the will of the said testator, all and singular the goods, chattels, rights, credits and estates of said deceased, within the State of Nebraska, which shall at any time come to your possession or to the possession of any other person for you, and to ask, gather, levy, recover, and receive all such personal property whatever of said deceased which to him did belong while he lived and at the time of his death; and to pay and discharge all debts, bargains and charges chargeable on the same or such dividends thereon as shall be ordered and decreed by said Court, hereby requiring you to make and return to said Court within three months a true and perfect inventory of all the property, real and personal, of said deceased which shall come to your possession or knowledge, or to the possession of any other person for you; and also to render a just and true account of your administration to said Court within one year and at any other time when required by said Court, and to perform all orders and decrees of said Court by you to be performed in the premises.

In Testimony Whereof, I have hereunto set my hand and seal of said Court at Omaha, the 27th day of April, A. D., 1889.

[Seal] (Signed), G. W. Shields.

UNITED STATES OF AMERICA, }
District of Nebraska. } ss.

I, Elmer D. Frank, Clerk of the Circuit Court of the United States for the District of Nebraska, certify that I have compared the annexed copy of The "Letters Testamentary" in case of J. M. Woolworth vs. Allen Root, with the original on file at this office, and that the same is a correct transcript thereof, and of the whole of said original.

IN TESTIMONY WHEREOF, I have caused the seal of said Court to be hereunto affixed at the City of Omaha, in said District, this 19th day of October, 1893.

ELMER D. FRANK,
[SEAL] Clerk.

Oliver P. Morton and Wife to Wm. S. T. Morton.

THIS INDENTURE WITNESSETH, that Oliver P. Morton and his Wife Lucinda Morton of the city of Indianapolis and Wayne County, in the State of Indiana, grant, sell, remise, release and forever quit-claim to William S. T. Morton without covenant of warranty of of Wayne County, in the State of Indiana, for the sum of Fifty Dollars, the following Real Estate in Douglas County, in the State of Nebraska, to-wit:

The equal undivided half of the following described piece or parcel of land situate in the north-west quarter of section Twenty-eight (28), Township Fifteen (15), north of Range Thirteen (13), east of the Sixth Principal Meridian; beginning at the north-west corner of said Section Twenty-eight (28), thence south eight (8) chains and Five (5) links, thence south Eighty-five (85)

degrees, Twenty (20) chains and Ten (10) links, thence north Nine (9) chains and Seventy (70) links, thence west Twenty chains to the place of beginning.

Together with all the tenements and appurtenances to the same belonging and all the estate, right, title, interest, dower, claim or demand whatsoever of the said Oliver P. and Lucinda Morton, of, in and to the same, or any part.

In Witness Whereof, the said Oliver P. Morton and his wife Lucinda Morton have hereunto set their hands and seals this 24th day of June, A. D., 1873.

In presence of

Sarah C. Gill. Oliver P. Morton, [Seal]

J. S. Harvey. L. M. Morton, [Seal]

State of Indiana, } ss.
Marion County. }

Before me, Jonathan S. Harvey, a Notary Public in and for said County, this 24th day of June, A. D., 1873, personally came the above named Oliver P. Morton and Lucinda Morton who are known personally, known to me to me to the identical persons whose names are affixed to the above deed as grantors, and acknowledge the execution of the annexed deed to be their voluntary act and deed.

Witness my hand and notarial seal.

Jonathan S. Harvey, [Seal]

[Seal] Notary Public.

Recorded July 14th, 1873, at 1 o'clock p. m.

Wm. H. Ijams,
County Clerk.

THE STATE OF NEBRASKA, } ss.
County of Douglas. }

I, T. A. Megeath, Register of Deeds in and for said County, in the state aforesaid, do hereby certify that I have compared the above and foregoing instrument as it appears of record in the office of said Register of Deeds in Book No. 14 of Deeds, at page 347 and that the same is a full and correct copy thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my seal of office this 5th day of August A. D., 1889.

(Signed),
T. A. MEGEATH,
[SEAL] Register of Deeds.

UNITED STATES OF AMERICA, } ss.
District of Nebraska. }

I, Elmer D. Frank, Clerk of the Circuit Court of the United States for the District of Nebraska, certify that I have compared the annexed copy of Deeds from Oliver P. Morton and Wife to Wm. S. T. Morton, in case of J. M. Woolworth vs. Allen Root, with the original on file in this office, and that the same is a correct transcript thereof, and of the whole of said original.

IN TESTIMONY WHEREOF, I have caused the seal of said Court to be hereunto affixed at the City of Omaha, in said District, this 19th day of October, 1893.

ELMER D. FRANK,
[SEAL] Clerk.

CERTIFICATE OF CITY CLERK.

At a meeting of the City Council of the City of Omaha, held on the 31st day of July, 1883, the following among other proceedings were had:

Mr. President,

Your committee to whom was referred the plat of Oakhurst Addition to the City of Omaha, report that we have examined the same and recommend that it be accepted and approved.

Report Adopted. JNO. F. BEHM.
Com. St. and Gds. C. D. WOODWORTH.

City of Omaha, SS.

I, J. B. Southard, City Clerk of said City, do hereby certify that the above and foregoing is a true, full and correct copy of the record of the proceedings of the City Council of said City, touching the plat of the Addition of Oakhurst to said City, as the same appears in the Journal thereof at page 84 of Volume R.

WITNESS my hand and the Seal of said City this 9th day of August, 1893.

(Signed) J. B. SOUTHARD,
City Clerk.

[SEAL] Per H. G. COUNSMAN,
Deputy.

At a meeting of the City Council of the City of Omaha held on the 10th day of July, 1883, the following among other proceedings were had:

The plat of Oakhurst Addition to the City of Omaha, N. ½ N. W. ¼ of N. W. ¼ Sec. 28-15-13, was referred to Com't on Sts. and Gds.

City of Omaha, SS.

I, J. B. Southard, City Clerk of said City, do hereby certify that the above and foregoing is a true, full and correct copy of the record of the proceedings of the City Council of said City touching the plat of the Addition of Oakhurst to said City, as the same appears in the Journal thereof at pages 7 and 8 of Volume R.

Witness my hand and seal of said City this 9th day of August, 1893.

[Seal] (Signed) J. B. Southard,
City Clerk.

United States of America, } ss.
District of Nebraska. }

I, Elmer D. Frank, Clerk of the Circuit Court of the United States for the District of Nebraska, certify that I have compared the annexed copy of Certificate of City Clerk, in case of J. M. Woolworth vs. Allen Root, with the original on file in this office, and that the same is a correct transcript thereof, and of the whole of said original.

In Testimony Whereof, I have caused the seal of said Court to be hereunto affixed at the City of Omaha, in said District, this 19th day of October, 1893.

[Seal] Elmer D. Frank,
Clerk.

CERTIFICATE OF CITY SURVEYOR.

I hereby certify that I have accurately surveyed and staked out the Streets and Alleys as shown on the accompanying plat and that the said Addition is located

in the N. ½ of N. W. ¼ of N. W. ¼ of Sec. 28, Town 15, Range 13, E. of the 6th Principal Meridian.

(Signed) J. E. House,
Surveyor.

I, J. M. Woolworth, proprietor of the land included in this Plat and in whom the fee simple title of the Streets and Alleys shown on said plat is now vested, do hereby state and admit that said plat is in accordance with my desire and wishes and I do hereby dedicate to public use the said Streets and Alleys, save and except the Alley in Block Three, and ratify and approve said plat.

In Witness Whereof, I have hereunto set my hand this 9th day of May, 1883.

In presence of J. M. Woolworth.
Geo. W. Ames.

State of Nebraska, } ss.
Douglas County. }

On this 19th day of May A. D., 1883, before me, a Notary Public duly commissioned and qualified in and for said County, personally came the above named J. M. Woolworth, to me known to be the identical person whose name is affixed to the foregoing conveyance as grantor, and acknowledged the instrument to be his voluntary act and deed.

Witness my hand and Seal Notarial the day and and year last above written.

Geo. W. Ames,
Notary Public.

[Seal]

Approved by the City Council July 31, 1883, Book R, Page 84.

J. J. L. C. JEWETT,
City Clerk.

Entered in Numerical Index and Recorded August 2d, 1883, at 10:30 o'clock, A. M.

JOHN BAUMER,
County Clerk.

STATE OF NEBRASKA, } ss.
County of Douglas. }

I, T. A. Megeath, Register of Deeds in and for said County, in the State aforesaid, do hereby certify that I have compared the above and foregoing instrument as it appears of record in the office of said Register of Deeds in Book No. 48 of Deeds at page 237, and that the same is a full and correct copy thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my Seal of office this 5th day of August, A. D., 1889.

[SEAL]

T. A. MEGEATH,
Register of Deeds.
By W. R. ENGLISH,
Deputy.

UNITED STATES OF AMERICA, } ss.
District of Nebraska. }

I, Elmer D. Frank, Clerk of the Circuit Court of the United States for the District of Nebraska, certify that I have compared the annexed copy of Certificate of City Surveyor in case of J. M. Woolworth, vs. Allen

Root, and of J. M. Woolworth (Plat omitted) with the original on file in this office, and that the same is a correct transcript thereof, and of the whole of said original.

IN TESTIMONY WHEREOF, I have caused the seal of said Court to be hereunto affixed at the City of Omaha, in said District, this 19th day of October, 1883.

[SEAL] ELMER D. FRANK,
Clerk.

UNITED STATES OF AMERICA,
District of Nebraska. } ss.

I, Elmer D. Frank, Clerk of the Circuit Court of the United States for the District of Nebraska, do hereby certify that the foregoing are true and full copies of the exhibits remaining of record in my office which were read in evidence upon the hearing of the case between James M. Woolworth, plaintiff, and Allen Root, defendant, as hereinbefore stated.

WITNESS my hand and the seal of said Court this 19th day of October, 1893.

(Signed),

[SEAL] ELMER D. FRANK.
Clerk.

IN THE SUPREME COURT OF THE UNITED STATES.

ALLEN ROOT, *Appellant.*

v.

JAMES M. WOOLWORTH.

WHEREAS, the will of William S. T. Morton was introduced and read in evidence upon the trial of the above entitled cause in the Circuit Court, but appears to have been omitted from the Transcript of Record sent to the Supreme Court of the United States, and

WHEREAS, it may hereafter be discovered that other documentary evidence in said cause has been likewise omitted from said Transcript.

IT IS HEREBY stipulated and agreed that the Clerk of the Circuit Court may send to the Supreme Court a certified copy of said will and the probate proceedings thereon, as the same appears of record in his office, and that any other documentary evidence introduced in said cause and omitted from said Transcript may in like manner be certified by the Clerk of the Circuit Court to the Supreme Court. Due proceedings *ex parte* may be taken to make the said documents parts of the record.

Dated Omaha, October 4th, 1893.

J. M. WOOLWORTH,
Appellee pro se.
G. W. COVELL,
Attorney for A. Root.

Office Supreme Court U. S.
FILED.
OCT 14 1892
JAMES H. McKENNEY,
CLERK.

150-401

SUPREME COURT
OF THE
UNITED STATES.

ALLEN ROOT,
Appellant.

vs.

JAMES M. WOOLWORTH,
Appellee.

No. 660,
October Term 1891.

No. 316
October Term 1892

Appeal from the Circuit Court of the United States for the District of Nebraska.

BRIEF IN BEHALF OF APPELLANT.

By GEORGE W. COVELL, and
UPTON M. YOUNG.

REDFIELD PRINTING CO., Omaha, Neb.

SUPREME COURT
OF THE
UNITED STATES.

ALLEN ROOT,
Appellant.

vs.

JAMES M. WOOLWORTH,
Appellee.

No. 660,
October Term 1891.

Appeal from the Circuit Court of the United States for the District of Nebraska.

BRIEF IN BEHALF OF APPELLANT.

STATEMENT OF THE CASE.

This is an original bill in equity, filed by James M. Woolworth against Allen Root, both parties citizens of Nebraska, to try the *legal* title to real estate, (valued at about $150.000) in Omaha, Nebraska. By an ingenious device of the pleader the bill is called a supplemental bill.

The bill seeks to quiet complainant's title; it is an action in the nature of an ejectment bill for possession of land; it is an action in the nature of a bill of peace; and

it purports to be a bill to carry into effect a former decree of this Court, dated May 8, 1873, in favor of Oliver P. Morton, of Indiana, (who is a stranger to this action) against said Allen Root.

The bill is propounded by Mr. James M. Woolworth, who was not a party to the former action or decree, but now claims a legal title to the land in controversy, by purchase, since the decree, from the said Morton, the complainant in the former suit. It appears from the bill in the present case, that on the 27th of August, 1870, said Oliver P. Morton, through his then solicitor, said James M. Woolworth filed a bill in the United States Circuit Court District of Nebraska, against said Allen Root, to remove a cloud upon his (Morton's) title; that he obtained the relief prayed for, and the court decided "that the relief prayed for is to remove the cloud upon Morton's title, and not for possession."

The bill in the present case avers that Woolworth purchased, since the former decree of May 8, 1873, from Morton and his son, and his son's executors, the land, the title of which was so quieted in said former action, and that he, Woolworth, holds and owns the legal title to same by reason of said purchase.

The present bill further avers that Root has no title to the land in controversy, but is in possession as a mere trespasser, and that his object in taking possession is to multiply actions to which the complainant will be driven in order to recover the premises; that in order to carry said decree of May 8, 1873, into execution, and give complainant the benefit thereof, it is necessary that it shall be supplemented by an order of injunction, and that unless said injunction be allowed the complainant, such decree

will be ineffective, and that complainant will be subjected to a multiplicity of suits; that defendant threatens to, and unless restrained by an injunction of this Court, will institute divers actions in respect to the title of said premises, and thereby vex, annoy and harass complainant.

The bill contains the usual prayer for injunction. The appellant, Allen Root, filed a demurrer to the bill on the ground that the complainant, Woolworth, was not entitled to the relief prayed upon the facts stated in the bill; that the court had no jurisdiction of the person of the defendant, said Allen Root, or of the subject matter of the bill, and that the bill did not state facts sufficient to constitute a cause of action. The court overruled the demurrer, and the defendant filed his answer. The following is a synopsis of the pleadings:

THE BILL

Avers that one Roswell G. Pierce in January, 1860, was seized in fee of the premises in controversy; that on the 18th day of January, 1860, one Heman Glass commenced an action against said Pierce in the district court of Douglas county, Nebraska, in attachment, and in that action recovered a judgment against Pierce for a large sum of money, That the premises in controversy in the present action were not attached in the action brought by Heman Glass against Pierce; and that Pierce was not served with process therein, and did not appear thereto, but that the said district court had jurisdiction to render its judgment solely by virtue of an order of attachment levied upon premises other than those in dispute in the present action.

That on the 31st day of July, 1861, Heman Glass

sued out of said district court a general execution directed to the sheriff of Douglas county; and that the said sheriff levied the said general execution upon the premises in controversy, and sold the same to Heman Glass; that after said sale the court confirmed the same, and the sheriff made to said Glass his deed in due form of law, conveying to said Glass the premises in controversy, and that said deed was recorded on the 30th of September, 861, in book M, of deeds, at page 531.

That on the 10th day of December, 1864, the said Heman Glass conveyed the premises in controversy by deed of that date, to Allen Root, and that on the second day of July, 1866, said deed from Heman Glass to Allen Root, was placed upon the records of the registry of Douglas County, Nebraska.

That on the 27th day of June, 1865, Oliver P. Morton commenced an action against said Roswell G. Pierce in the District Court of Douglas County, Nebraska, to recover from him a large sum of money alleged to be due from said Pierce to said Morton, and that in said action an order of attachment was issued to the Sheriff of said Douglas County, Nebraska, commanding him to attach the goods, chattels, lands and tenements of the said Pierce; and that upon the said order of attachment the said Sheriff attached the premises in controversy. That at the October term for the year 1865, said O. P. Morton recovered a judgment in said district Court against the said Pierce for $2,739 for his damages, and $25.00 for his costs, and an order for the sale of the premises to satisfy said judgment. That on the 18th day of May, 1868, he caused an order of sale to be issued out of said Court to the Sheriff of said County, commanding him to sell the

lands in controversy for the satisfaction of the said judgment, and that on the 29th day of June, 1868, the said Sheriff sold the said premises to the said O. P. Morton for $1,775.00, and that at the July term of said Court following said sale, the said Court confirmed the same, and directed the said Sheriff to convey the premises to the said Morton, and that he thereupon conveyed the same by his deed dated the 30th day of April, 1869.

The bill alleges that on the 6th of January, 1866, more than two years before the alleged sale of said premises to said Morton, under said alleged writ of attachment and order of sale, said Morton commenced an action in the District Court of Douglas County, Nebraska, against Roswell G. Pierce and Heman Glass, to quiet the title of said premises in Oliver P. Morton, as against Heman Glass and Roswell G. Pierce. And that the said Glass appeared and answered the bill of complaint in that cause; and that at the October term of the said Court for the year 1866, a decree was rendered in that suit, whereby it was declared that the judgment recovered by Glass against Pierce in his action commenced January 18th, 1860, was never a lien upon the premises in controversy, and that the title thereto was not affected by the sale thereof by the Sheriff of said Douglas County to Heman Glass.

The said bill further alleges that, on the 27th day of August, 1870, Oliver P. Morton exhibited his bill in the Circuit Court against Allen Root, alleging the matters hereinbefore referred to, and further alleging that Allen Root on the 24th day of February, 1872, filed his answer to that bill; that he, in his answer, insisted that the judicial proceedings referred to in said bill, whereby Glass

claimed the title to the premises in controversy were good and effectual to pass the title to Glass and by virtue of his conveyance from Glass to fix the title in him; and further alleging that the judicial proceedings whereby Oliver P. Morton claimed to have acquired the title to the premises in controversy, were illegal and invalid, and ineffectual to pass the title to the said premises to said Morton.

The bill further alleges that upon said bill and answer a decree was rendered on the 8th of May, 1873, upon the pleadings and proofs and exhibits in the said suit, in which decree it was ordered, adjudged and declared that the judgment recovered by Glass against Pierce before mentioned was never a lien upon the said premises, and that the deed made by the Sheriff to Glass, and the deed made by Glass to Root were each and every one of them utterly void and of no effect; and that within ten days from the date of said decree the said Root should make a conveyance of the premises in controversy to said Morton, and that if he failed to do so Watson B. Smith, who was appointed a Master in Chancery for that purpose, should make such conveyance in the place of the said Root.

The bill further alleges that Root, having failed to make the deed as by the decree directed, said Watson B. Smith, as Master, made his deed by which he conveyed the premises in controversy to the said Morton on behalf of Root, and that that deed was recorded in book — of deeds, in the Registry of Douglas County, at page 346, on the 14th day of July, 1873.

The bill further alleges that on the 19th day of August, 1869, Oliver P. Morton, with Lucinda his wife, for the consideration of one thousand dollars to him paid,

made an instrument in writing, purporting to convey the said premises to William S. T. Morton, but that the said deed was ineffectual for that purpose because it was not made in the presence of an attesting witness, and was not attested by a witness.

The bill further alleges that afterwards, on or before the 24th day of June, 1873, Oliver P. Morton and Lucinda, his wife, by the direction and at the request of William S. T. Morton, granted, sold, remised, released and quitclaimed the undivided half of the premises in controversy to James M. Woolworth, and that that deed was recorded in the Registry of Deeds of Douglas County on the 12th of July, 1873, in book 14 of deeds, page 341.

The bill further alleges that afterwards it was by and between Oliver P. Morton and William S. T. Morton agreed and understood that the title acquired by Oliver P. Morton, under and by virtue of the judicial proceedings recited in the bill, should be held, taken and treated as the property of William S. T. Morton, and that a conveyance should be made by the said Oliver P. Morton in order to fix the legal title to the premises in the said William S. T. Morton. The bill alleges that Oliver P. Morton and William S. T. Morton died before the said conveyance had been executed.

The bill further alleges that William S. T. Morton left a will whereby he appointed James McCullough and William A. Peelle, executors, and Lizzie M. Morton, his wife, as executrix, with full power expressed in the will, to sell and convey any and all real estate of which he died seized, and that the will was duly probated in the office of the Clerk of the Circuit Court of Wayne, in the

State of Indiana, and that letters were thereupon duly issued out of said Court to them.

The bill further alleges that on the 4th of June, 1879, James M. Woolworth purchased the undivided half of the premises in controversy, from the executors and executrix, and paid them therefor $443.75, and that the executors and executrix made their deed bearing date of June 4th, 1879, by which they conveyed to James M. Woolworth the undivided half of the premises in controversy; and that that deed was recorded on the 25th of June, 1879, in the Registry of Douglas County, in book 28 of deeds, page 94.

The bill further alleges that William S. T. Morton purchased the undivided one half of the premises in controversy, from Oliver P. Morton, and paid him the full consideration thereof, in the belief that by virtue of the decree of the District Court of Douglas County, and by virtue of the judicial proceedings had and taken by him as complainant against Pierce, and the Sheriff's deed to him of the premises in controversy, that title was vested in him, William S. T. Morton, and that James M. Woolworth purchased said premises in controversy, and paid for the same to Oliver P. Morton and William S. T. Morton, the said one thousand dollars in the like belief; and that he took the title of the premises in controversy from O. P. Morton and the executors and executrix of the last will and testament of William S. T. Morton, in the like belief.

The bill further alleges that in 1873 James M. Wool worth and William S. T. Morton entered into the premises in controversy, and that from that time to the time of the filing of the bill James M. Woolworth had paid all

the taxes which at any time had been levied and assessed upon the premises, by the said city of Omaha, and the county of Douglas and state of Nebraska, unless some such taxes have subsequently escaped his attention.

And the bill further alleges that the defendant has never paid any taxes levied or assessed upon the premises in controversy.

The bill further alleges, that on the second day of August, 1883, Woolworth laid out the premises in controversy as an addition to the city of Omaha, under the name of Oakhurst, into lots, blocks and streets and alleys, and that he filed a plat thereof in the Registry of said County, and obtained the approval of the same by the City Council of said city; and that since that time taxes of city and county have been levied and assessed upon the premises as lots.

That shortly after the filing of said plat Woolworth began the sale of lots into which the tract had been divided, and made the sale of six or more lots; that afterwards, in the years 1885 and 1886, he re-purchased four (4) of the lots so conveyed and sold by him, paying a large consideration therefor.

That all the proceedings stated in his bill were known to the defendant, Root, but he made no claim of the premises, or any part thereof, until about one month before the filing of the bill by James M. Woolworth.

The bill further alleges that Root, about one month prior to the filing Mr. Woolworth's bill, took possession of the premises in controversy, and built fences around the same, and a house thereon, into which he removed with his family; and that he gave it out to the public that he would lease parts of the premises to any person

or party who would build a house thereon or occupy the same; and that he had already induced some persons whose names are not given in the bill to accept his offers; and that he was exercising great diligence and energy in securing others to occupy a part of the premises in like manner upon the same terms. That Root's object in these proceedings was to multiply actions, to which Woolworth would be driven in order to recover the premises and establish his rights thereto.

The bill further alleges that Root, in entering upon the premises in controversy and claiming the same claimed no rights whatever except such as were derived by him from Glass.

The bill further alleges that it is necessary, that in order to carry into effect the decree of this Court, rendered on the 8th of May, 1873, it should be supplemented by an order of injunction prayed for in the bill, and that unless such injunction should be allowed by the Court, the former decree would be ineffective, and that Mr. Woolworth would be subjected to a multiplicity of suits in order to recover the premises from the parties to whom the defendant, Root, would lease the same.

The bill further alleges that, if left to himself, Root would not only subject Mr. Woolworth to numerous actions for the recovery of the possession of said premises from the many parties whom Root would induce to enter upon the same, but Root threatened to, and unless restrained by the order of and injunction of this Court, he would institute divers actions in respect to the title of the premises, and thereby vex, annoy and harrass Mr. Woolworth.

The bill further alleges that there was an apparent

obscurity and defect in the judicial proceedings by which Oliver P. Morton claimed to have acquired title to the premises in controversy, and that the defendant claimed that the description of the premises in the Sheriff's deed, and in the said judicial proceedings were radically defective, because the word "east" is omitted after the words "eighty-five (85) degrees," in the second call in the deed.

The bill further alleges that in the bill in equity exhibited by Oliver P. Morton in the Circuit Court, the sufficiency of the description of the premises in such deed, and such judicial proceedings were considered by the Judges, and that they held that the omission was not a defect; and that notwithstanding such omission, the title passed by the said proceedings and deed to Oliver P. Morton.

PRAYER OF THE BILL.

The bill prayed for an injunction against Root, enjoining him from asserting any right, title or interest in the premises, and from occupying the same or any part thereof, or from leasing or pretending to lease, or admitting under any pretense whatever, any party save James M. Woolworth into the premises, or upon the same or any part or parcel thereof, or from making any verbal or written contract, lease, deed or conveyance, affecting the premises or possession thereof or title thereof, or any part thereof, and restraining and enjoining Mr. Root from excluding Mr. Woolworth from the premises or any part thereof, or from preventing him from taking sole and exclusive possession of the same, and restraining and enjoining Mr. Root from bringing any action or actions touching the title or possession of the premises, and praying

that by the decree of this Court it should be declared that the defendant Root had not, and never had any interest whatever in the land in controversy; and further praying that a writ of possession issue out of this Court, under the seal thereof, directed to the Marshal of this Court, commanding him summarily to remove the defendant Root, and his tenants and agents therefrom.

And further praying that the injunction prayed for in their said bill be made perpetual, and that Mr. Woolworth have his costs of this suit, and such other and further relief as the circumstances require, and is agreeable to equity and to good conscience.

THE DEMURRER.

To this so called supplemental bill the said Root filed a demurrer, which was overruled by the Court. Root then filed an

ANSWER.

This denied that Roswell G. Pierce was divested of the title to the premises in controversy by the judicial proceedings recited in Mr. Woolworth's bill of complaint, as having occurred in the District Court of Douglas County, Nebraska, in the suit by attachment brought by Oliver P. Morton, on the 27th day of June, 1865, and denied that the Sheriff of Douglas County in that action, upon an order issued in that suit, attached and levied upon the premises in controversy, and denied that Oliver P. Morton recovered a valid judgment in that Court, against Pierce, for $2,739.00, his damages, and $25.00 for his costs; and alleged that the pretended judgment of that Court against Pierce, was never a lien upon the premises in controversy; and that it was utterly void and of no effect, because

there never was any attachment made of the premises described in the complainant's bill of complaint; and that by reason of there having been no attachment of the said premises, that Court acquired no jurisdiction to render any judgment whatever in favor of Oliver P. Morton, and against Pierce, or to make or issue any order of sale, of the premises in controversy.

The answer alleged in connection with the foregoing denials, that Jane A. North pre-empted the lands in controversy, and acquired the title thereto on the 30th of July, 1857. That she never parted with the title to the premises in controversy, by virtue of any deed made by her to any person or persons while the title thereof was vested in her. In said answer, Root alleged that on the 27th of November, 1861, William Wade, in an action brought by him in the District Court of Douglas County, Nebraska, obtained a decree of that Court against Jane A. North, and one Horace Green, in which decree it was ordered and decreed that Jane A. North execute and deliver to William Wade a deed in fee simple, absolutely conveying the premises in controversy to Wade, and that that decree is found of record in Journal C, of the records of the District Court of Douglas County, at page 55 thereof, and that thereby the title of the premises in controversy vested in William Wade.

Defendant Root in his said answer further denied that the Sheriff of Douglas County, Nebraska, duly conveyed the premises in controversy to said Morton, either on the 13th of April, 1869, or on April 30th, 1869, but alleged that the Sheriff's deed for said premises was radically defective, and that it was not duly acknowledged by Aaron R. Hoel, Sheriff of Douglas County, but that the

acknowledgment was radically defective, and that the deed was, by reason thereof, illegal and void, and that the description in said deed was indefinite and uncertain, and that said deed was void because the premises were not attached, and that it conveyed no title to Oliver P. Morton in and to the premises in controversy.

Defendant Root in his answer further denied that any valid decree was rendered or entered by the District Court of Douglas County, Nebraska, in the proceedings alleged in Woolworth's bill, in favor of Oliver P. Morton, against Heman Glass and Roswell G. Pierce, at the October term for the year 1866, of that Court, of the nature and effect alleged in Woolworth's bill, and alleged that whatever pretended decree was rendered in that Court, was obtained by fraud practiced upon that Court, by the said O. P. Morton, and by James M. Woolworth, as his attorney, by pretending and alleging that Morton had then acquired, by virtue of his alleged attachment proceeding against Pierce, all of the right, title and interest which Pierce held in and to the premises in controversy, when they and each of them knew that Morton had not acquired, at the date of the rendering of that decree, the apparent title and interest claimed to be held by Pierce in the premises in controversy, and by reason thereof, it is alleged that the decree was void, absolutely, and of no effect.

Defendant Root further alleged in his answer, that the premises in controversy in these proceedings were not described in the bill of complaint of Oliver P. Morton against Heman Glass, in the District Court of Douglas County, nor were they described in the pretended decree rendered therein, and that by reason thereof the premises in controversy were not affected by the said pretended

decree, and that the same was void and of no effect as to the premises in controversy in this proceeding.

Defendant Root, in his said answer, admitted the rendition and obtaining of the decree alleged in the bill in the Circuit Court, under Morton's bill of complaint exhibited therein, on the 27th day of August, 1870, and that said decree was rendered on the 8th of May, 1873, but alleged that the Court in its opinion and decree, found upon the pleadings, proofs and exhibits, produced by and on behalf of Morton and Root, that Morton was entitled to the relief prayed in his bill, which the Court stated in his opinion was "to remove the cloud upon his title, and not for possession of the premises."

Root further admitted in his answer that he failed to make the deed directed by the said decree, and that Watson B. Smith, as Special Master in Chancery, on the 12th of June, 1873, made his deed on behalf of Root to Morton, describing the premises as they were described in that decree, and purporting to convey the same, and that that deed was recorded July 14th, 1873, in book 14 of deeds, in the Registry of Douglas County, at page 346.

Defendant Root in his said answer alleged that the said decree was obtained by Morton, complainant, and by James M. Woolworth, as his attorney and solicitor, in that suit, by fraud practiced upon the Court presided over by Judge Dillon, by pretending and alleging that, on the 27th of August, 1870, the date of the filing of the bill by Morton in that Court, he the said Morton, was seized in fee of the premises in controversy, and by exhibiting to that Court as evidence of title in Morton, a certified copy of the record of the alleged Sheriff's deed of the premises in controversy, and purporting to have

been made and acknowledged by Aaron R. Hoel, as Sheriff of Douglas County, Nebraska, on the 13th of April, 1869, they and each of them well knowing that the decree and all of the proceedings in the Territorial Court in which said Sheriff's deed was ordered to be made, and by virtue of which it was executed, were void and of no effect, and that the said Sheriff's deed conveyed no title, and also by studiously concealing from that Court, presided over by Judge Dillon, the fact that Oliver P. Morton and his wife Lucinda had, on the 19th day of August, 1869, made, executed and delivered to one William S. T. Morton, a quit-claim deed to said premises, duly executed and acknowledged according to the laws of the State of Indiana, in the County of Wayne, in that State, by which all of the alleged right, title, estate, interest, claim and demand, both at law and in equity, of Oliver P. Morton in and to the premises in controversy, were conveyed to the said William S. T. Morton, and that said deed was duly recorded on the 15th day of September, 1869, in the Registry of deeds of Douglas County, Nebraska, in book 7 of deeds, at page 154; and defendant further alleged that at the date of the exhibition of said bill by Oliver P. Morton in this Court, he had no right, title or interest in and to the premises in controversy, but that all the title he ever had in and to said premises, was, at that date, and at the date of the rendition of the decree in and by that Court, held and owned by the said William S. T. Morton, and that, by reason of the fraud practiced upon that Court, the said decree was void and of no effect, and vested no right whatever in Oliver P. Morton, and that he had no right whatever to maintain his bill against this defendant Root, to remove the cloud from his alleged

title, and no right whatever to obtain the decree of that Honorable Court against Root; and that by reason thereof he, the said Oliver P. Morton, acquired no right or title thereby, nor by virtue of the conveyance by Watson B. Smith, as Master in Chancery, to him of the premises in controversy.

Defendant Root further alleged that at the date of the filing by Morton of his bill against him, and at the date of the rendition by that Court, of the decree, he had no knowledge or information whatever that O. P. Morton and Lucinda, his wife, had deeded on the 19th day of August, 1869, the premises in controversy to William S. T. Morton, and that he acquired his first knowledge and information thereof since the filing of the bill in the present cause by James M. Woolworth.

Defendant Root, further answering denied that the deed from Oliver P. Morton, and his wife Lucinda, to William S. T. Morton, dated August 19th, 1869, purporting to convey to him all the right, title and interest of the said Oliver P. Morton, in and to the premises in controversy, was ineffectual for that purpose, because the same was not made in the presence of an attesting witness, and was not attested by a witness, but defendant Root alleged that if Oliver P. Morton, at the date of said deed, had any right, title, interest or estate which he could convey, the same were effectually conveyed by that deed from him and his wife Lucinda, to William S. T. Morton.

Defendant Root further alleged that Oliver P. Morton conveyed no title to James M. Woolworth in and to the premises in controversy, by virtue of his deed made and executed the 24th day of June, 1873, to said Woolworth, for the undivided half of said premises, because he had

no title, interest or estate to convey, and that Mr. Woolworth acquired no right, title or interest in or to the premises thereby.

He also denied that it was afterwards agreed and understood between Oliver P. Morton and William S. T. Morton, that the title acquired by Oliver P. Morton by virtue of the judicial proceedings prosecuted by him against Pierce, and the Sheriff's deed to him thereunder, should be taken, held and treated as the property of William S. T. Morton.

Defendant further admitted that on or about the 24th day of June, 1873, Oliver P. Morton quit-claimed for an expressed consideration of $50.00, to William S. T. Morton the other undivided one half of the premises in controversy, but he alleged that no title was conveyed by Oliver P. Morton to William S. T. Morton thereby.

Defendant Root further denied that William S. T. Morton left a will whereof he appointed Thomas McCullough and William A. Peelle executors, and Lizzie M. Morton, his wife, executrix, and denied that said will gave said executors and executrix full power to sell and convey any real estate of which William S. T. Morton died seized.

Defendant Root further denied that the complainant, Woolworth, purchased the undivided half of the premises in controversy, from the said executors and executrix, on the 4th day of June, 1879, and paid therefor the sum of $443.75, and denied they conveyed to him the undivided half of said premises by their deed, duly executed and acknowledged. And he alleged that if said executors and executrix did execute their deed therefor to James M. Woolworth, they did not convey to him any title thereby,

and that he did not acquire any right, title or interest therein, by reason thereof.

Defendant further alleged that neither William S. T. Morton nor James M. Woolworth took or received or acquired any title in or to said premises by virtue of the quit-claim deeds executed to them by Oliver P. Morton and his wife.

Defendant Root further denied that Mr. Woolworth and William S. T. Morton, in 1873, entered into the premises in controversy, and alleged that they did not, nor did either of them, then or at any other time, enter into and take possession of the premises in controversy, or any part thereof, and that neither of them ever was in the possession at any time, of said premises.

Defendant Root further answering, denied that Woolworth, on the second of August, 1883, laid out the lands in controversy as an addition to the city of Omaha, into lots, blocks, streets and alleys; and denied that he filed a plat thereof in the Registry of said County approved by the City Council of said city.

Defendant Root further answering the bill alleged that, on or about the first day of May, 1869, he entered into the actual possession of all of the premises in controversy, with the intention of occupying the same as his own, and he carried that intention into effect by the open, notorious, exclusive, adverse possession of all of said premises, by him from that date, until the filing of complainant's bill herein, and that he had kept and maintained a fence and fences around the greater portion thereof for more than nineteen (19) years last past, and ever since the first day of May, 1869, and that he had used and occupied said premises as his own, and adverse to

complainant herein, and adverse to all persons whomsoever, for more than nineteen (19) years last past; and that at the filing of complainant's bill, he was in the actual, open, notorious, exclusive and adverse possession of all of said real estate, with a fence around the whole thereof, and a house thereon, in which defendant lived with his family.

Defendant further answering, alleged that neither J. M. Woolworth, nor any of his grantors had ever been in the possession or occupancy of said premises or any part thereof, at any time within nineteen (19) years last past, before filing his bill, or at any time or date whatever, and that, in consequence thereof all of complainant's right of action, if any he ever had, was barred by the statute of limitation of the State of Nebraska.

Defendant Root further answering complainant's bill, denied that he had given it out to the public that he would lease parts of the premises to any person or party who would build houses thereon and occupy the same, and denied that he had induced any person to accept any such offers, and denied that he was exercising great diligence in securing any other persons to occupy parts of the premises in controversy upon the same terms, or upon any terms whatever, and he also denied that his object in occupying the said premises was to multiply actions to which plaintiff would be driven in order to recover possession of said premises, and to establish his rights thereto.

Defendant further denied that in entering upon said premises and claiming the same, he claimed no rights except such as were derived by him from Glass, and alleged that he claimed the premises and the whole thereof, as his own, and had so claimed the same continuously for more

than nineteen (19) years last past before the filing of complainant's bill.

Defendant denied that unless an injunction was allowed herein, the complainant would be subjected to a multiplicity of suits in order to recover possession of the premises from the parties to whom defendant would lease the same, and alleged that he was not trying to lease the same or any part thereof, to any person or persons whomsoever.

Defendant denied that he would subject complainant to numerous actions for the recovery of said premises, and denied that he threatened to and would institute divers actions in respect to the title of the premises, unless restrained by injunction of the Circuit Court, and denied that he would thereby vex, harrass and annoy the complainant, and denied that he had any such intention, and did not have when the complainant's bill was filed.

The defendant further answering, admitted that he claimed that there was a radical defect in the description of the premises, in the judicial proceedings instituted by Morton, and the Sheriff's deed to Oliver P. Morton, because the word "east" was omitted after the words "85 degrees," in the second call of said deed, and he admitted that in the bill in equity, exhibited by Oliver P. Morton, the Judges considered the sufficiency of that description, and held that the omission was not a defect, and that notwithstanding the same, the title passed by the proceedings, to Oliver P. Morton, but he alleged that the said holding of the said Judges was, and is void, because it was obtained by fraud practiced upon that Court, and upon the judges thereof, as before alleged in his answer.

Defendant denied that the complainant was without

relief in a court of law, but alleged that he had a complete and adequate remedy at law.

Defendant further answering alleged that the Circuit Court had no jurisdiction to entertain complainant's bill, both because complainant and defendant are citizens of the same State and District, and because it is a proceeding in a court of equity, in the nature of an *ejectment bill*, to recover the possession of real estate, and because complainant had a plain, complete and adequate remedy at law.

The following is the statement of the record title of the appellant and appellee:

Record title in Allen Root, appellant.

In 1860 the title was in Roswell G. Pierce.

Jan. 18, 1860, Heman Glass began an action against Roswell G. Pierce in District Court, Douglas County, Territory of Nebraska, and had a writ of attachment issued, which was levied upon certain real estate, but not including the lands now in suit. No personal service, but constructive service on Pierce. Pierce did not appear.

July 31, 1861, an execution was issued on a deficiency judgment in above case. The execution was levied on the lands in suit, lands sold to Heman Glass, and sale confirmed.

Sept. 30, 1861, sheriff made deed to Heman Glass. Deed recorded book "M," p. 531.

December 13, 1864, Heman Glass and wife deeded the lands to Allen Root.

July 2, 1866, deed from Glass to Allen Root was recorded in book "F," p. 239.

Record title of James M. Woolworth, Appellee.

June 27, 1865, O. P. Morton commenced suit in Douglas County, Territory of Nebraska, against Roswell G. Pierce, and caused a writ of attachment to be issued. (The writ of attachment cannot be found among the records, and there is no record that the attachment was levied upon these lands).

Oct. 1865, a judgment was rendered in favor of Oliver P. Morton against Roswell G. Pierce for $2,739.

Jan. 6, 1866, Oliver P. Morton filed his bill in equity in the same court against Heman Glass and Roswell G. Pierce to set aside the sale in the suit of Glass vs. Pierce, and the sheriff's deed to Glass for the pretended reason that the court had no jurisdiction, under the circumstances of that case, to issue a general execution and to levy upon and sell these lands for the reason that there was no appearance or personal service upon Pierce.

Oct. 1866, a decree was entered in the suit of Oliver P. Morton vs. Glass and Pierce, decreeing that Heman Glass had no lien upon the lands in controversy arising under said execution sale. (Allen Root was not made a party to that suit, although it appears that the deed to Allen Root was dated December 13, 1864, and was recorded July 2, 1866, so that the deed to Root was of record before the date of the decree in the case of Morton vs. Glass and Pierce.)

May 18, 1868, after the decree in the case of Oliver P. Morton vs. Glass and Pierce, decreeing that Glass had no lien upon these lands, an order of sale was issued in the suit of Oliver P. Morton vs. Roswell G. Pierce.

June 29, 1868, under the order of sale these lands were sold to Oliver P. Morton for $1,775.

April, 1869, the sheriff of Douglas County made a

deed of the lands to Oliver P. Morton.

Aug. 27, 1870, Oliver P. Morton began a suit in circuit court against Allen Root, to set aside the title of Root and to quiet the title in Oliver P. Morton.

February 24, 1872, Allen Root answered in the suit in circuit court.

May 8, 1873, the decree was entered in the suit of Oliver P. Morton vs. Root to the effect that the judgment of Glass against Pierce was no lien upon these lands for want of personal service, and that the deed from the sheriff to Glass and the deed from Glass to Root were void, and directing Watson B. Smith, as master, to make a deed to Oliver P. Morton.

July 14, 1873, Watson B. Smith, pursuant to the decree, made a deed to Oliver P. Morton.

Aug. 19, 1869 (and prior to the commencement of the suit in the name of Oliver P. Morton against Allen Root in the circuit court, to quiet the title in Morton), Oliver P. Morton and his wife deeded this property to William S. T. Morton, by deed dated August 19, 1869, recorded in book 7, p. 154, which deed was made in the State of Indiana, but not witnessed.

June 24, 1873, Oliver P. Morton and wife quitclaimed to the complainant, James M. Woolworth, an undivided one-half of said lands.

June 4, 1879, Thomas McCullough and William A. Peelle, executors, and Eliza M. Morton, executrix, of the last will of William S. T. Morton, deceased, deeded to the complainant, James M. Woolworth the equal undivided one-half of said lands.

The bill in this case admits that the appellant, Allen Root, is in possession of the property, and prays for a

writ directed to the Marshal to oust him from the possession, and to put the complainant in the possession of the property by way of a supplemental decree to the decree ssued May 8, 1873, in the suit of Oliver P. Morton vs. Allen Root.

Answer sets up title by adverse possession, and prayed for cancellation of decree of May 8, 1873, and for other relief.

ASSIGNMENT OF ERRORS.

I.

That the bill in equity filed in the case aforesaid in the United States Circuit Court for the District of Nebraska, by James M. Woolworth against Allen Root, and the matters therein contained, are not sufficient in law for the said James M. Woolworth, complainant, to have or maintain his aforesaid action thereof, and against the said Allen Root.

II.

That the said Circuit Court of the United States for the District of Nebraska, erred in not sustaining the demurrer of the defendant, Allen Root, to the bill of complaint of James M. Woolworth, complainant, the grounds and causes of which demurrer, are as follows:

1. That the said plaintiff has not in and by his said bill, made and stated such a case as doth and ought to entitle him to any such relief as is thereby sought or prayed for from or against this defendant.

2. That this Court has no jurisdiction of the person of this defendant, or of the subject of this action, as it appears on the face of said bill, that plaintiff and defendant are both citizens of the State of Nebraska.

3. That it appears on the face of complainant's bill,

that he has an adequate remedy at law, and is not entitled to maintain this action in equity.

4. That the said plaintiff's bill does not state facts sufficient to constitute a cause of action in favor of plaintiff and against this defendant.

III.

That the said Circuit Court for said District erred in admitting in evidence and considering the deed from Thomas McCullough, Eliza M. Morton and William A. Peelle, executors of the will and estate of William S. T. Morton (deceased), marked "Exhibit SS," of complainant's testimony.

IV.

The said Circuit Court aforesaid erred in admitting in evidence and considering the deed from Oliver P. Morton and wife to James M. Woolworth, marked "Exhibit TT," of complainant's testimony.

V.

The said Circuit Court for the said District erred in admitting in evidence, and considering the confirmatory deed made by Thomas McCullough and William A. Peelle, two of the executors of the will and estate of William S. T. Morton (deceased), marked "Exhibit UU," of complainant's testimony.

VI.

The said Circuit Court erred in admitting in evidence and considering the certified transcript of the pleadings, proceedings, record and decree of the District Court in and for the Territory of Nebraska, in the case of Oliver P. Morton vs. Roswell G. Pierce, Heman Glass, et al., of complainant's testimony.

VII.

That the said Circuit Court for said District erred in admitting in evidence and considering the certified transcript of the pleadings, proceedings, record, testimony, the opinion of Circuit Judge Dillon, and the decree of the United States Circuit Court in the case of Oliver P. Morton, complainant, vs. Allen Root, defendant, from the Circuit Court of the United States for said District, of complainant's testimony.

VIII.

The said Circuit Court for said District erred in admitting in evidence and considering the testimony of James M. Woolworth, complainant, from question number 216 to number 218 inclusive, of said complainant's testimony, and erred in overruling defendant's objections to said testimony, as shown by the record, and in overruling the defendant's motion to strike out of the record the said testimony of James M. Woolworth, which testimony is as follows:

216. Q. Do you wish to make any statement in respect to the suit brought by Oliver P. Morton, about August, 1870, in respect to these premises, and if so, you may proceed in your own way to make your statement.

Defendant objects to any statement being made by witness without any questions being asked, and to which defendant can enter his objection, as improper, incompetent and unfair.

A. Some little time before that bill was filed—two or three months before—Mr. William S. T. Morton came to see me with reference to the title to these premises, and other litigations which I then had, and litigations which I had had previously for him, and other business. I had

previously advised him to the effect that the deed had appeared upon record of the County from Glass, of the land to Mr. Root, which antedated the decree which I had obtained for Oliver P. Morton in the District Court of the Territory. The fact of that deed appearing on the record came to my knowledge within a year from the time William S. T. Morton came here, but I cannot state exactly when I advised Mr. Morton that it was necessary to take steps to enforce that decree against Allen Root, and obtain a further decree against him of the same character which I had obtained against Glass. William S. T. Morton was a brother of Senator Oliver P. Morton, and Mr. William S. T. Morton advised me that his brother had an interest in the litigations together with him, which I had had, and which I believe were in the name of William S. T. Morton, and perhaps one of them was in the name of Oliver P. Morton, or he was a party. I do not recollect about that, but William S. T. Morton produced to me a writing, which was in his hand writing, but was signed by himself and Oliver P. Morton, the exact terms of which I cannot very distinctly recollect, beyond this fact that—

Defendant objects to a statement by the witness of the contents of any written instrument whatever without the production of the instrument, or accounting for the loss of it, and he objects to this mode of proceding as unfair, unprofessional, and as contrary in every way to the decent practice of law.

Plaintiff objects to the objection of the defendant as unprofessional and unfair, and as made for the purpose of prejudicing the case of the plaintiff.

A. This writing which I have referred to recited some dealings between these parties in respect to these litiga-

tions, and that the title to these premises was again involved in litigation, and to the best of my recollection, that instrument was neither witnessed nor acknowledged, and although somewhat lengthy was rather informal and was in effect in its terms a conveyance, but it may have been nothing but an agreement for a conveyance of these premises from Oliver P. Morton to William S. T. Morton.

Defendant moved to strike out the answer of this witness as to the contents of the written instrument which has not been produced nor the loss of which has not been accounted for, from the record as incompetent.

A. William S. T. Morton stated that he and his brother had cancelled the settlement, the previous settlement, I do not know whether it was completed or partial, of some of their dealings in the course of which William S. T. Morton had taken these premises and the question arose between us in whose name any suit should be brought, and my recollection is he had with him a conveyance previously made by Senator Morton to himself, but I cannot speak certain about that. I do not know but I examined one with him. I know that he and I went to the County Clerk's office and examined the title to the land, and we may have instead looked at the original instrument or looked at a copy of it, but, on account there being no witness to the deed from Oliver P. Morton to William S. T. Morton, I advised him that it would be necessary to bring an action in the name of Oliver P. Morton, and by his direction I accordingly brought suit in that way, and afterwards, I think in the following winter—I am very certain it was the following winter, but I cannot tell exactly the part of the winter, I

saw Senator Morton in Washington, but I think I had met him before, and I had a conversation with him about these interests, and he confirmed the statement that William S. T. Morton had made to me with reference to the cancellation of the agreements to settlements they had previously made, and accordingly I brought this action, the record of which I introduced this afternoon.

217. Q. In the name of whom?

A. In the name of Oliver P. Morton.

218. Q. Is there anything else in that connection?

A. I do not think of anything else."

IX.

The said Circuit Court for said District erred in entering its decree, as follows:

FIRST.—It is hereby declared that the plaintiff has, by divers conveyances, succeeded to the title of Oliver P. Morton, the plaintiff in the original bill, exhibited in this Court by him, against Allen Root, the defendant herein, and that the said plaintiff is entitled to the benefit of the decree of this court, bearing date the 8th of May, 1873, rendered in the said suit and to have the same carried into execution."

X.

The said Circuit Court for said District erred in entering its decree, as follows:

"SECOND. It is hereby further declared that the defendant has not and never had any interest in the premises, in the said decree, and the supplemental bill filed in this suit, and hereinafter described, or any part thereof, and that the possession of the said premises by him alleged in his answer in this suit is, and since the decree

of this court hereinbefore mentioned, has been subject to the title in and by the said decree adjudged to and quieted in the said Oliver P. Morton. And that the pretense of possession adverse to that of the plaintiff herein alledged by the said defendant in his said answer, is against and in violation of the said decree."

XI.

The said Circuit Court for said District erred in entering its decree as follows:

"THIRD. It is hereby ordered, adjudged and decreed that the injunction issued out of this Court at the filing of this supplemental bill, enjoining and restraining the said defendant, his agents, attorneys, solicitors and counsellors, from asserting any right, title or interest in the said premises, or any part thereof, and from occupying the same or any part thereof, or leasing or pretending to lease to others, the same or any part thereof, or under any pretense whatever, admitting any party into or upon the said premises, or any part or parcel thereof, or making any verbal or written contract, lease, deed or conveyance, to any person or persons, party or parties, purporting to affect the title to said premises, or any part thereof; and from excluding the plaintiff from the said premises, or any part thereof, or preventing the said plaintiff from taking sole and exclusive possession of the same; and from bringing any action or actions touching the title to, or possession of the said premises, be, and the same is hereby made perpetual; and it is further ordered that a writ of perpetual injunction issue out of this Court, and under the seal thereof, directed to the said defendant, his agents, attorneys, solicitors and counsellors, commanding and en-

joining him and them, and each and every of them, as in and by the said provisional injunction was commanded and enjoined, and hereinbefore recited."

XII.

The said Circuit Court for said District erred in entering its decree as follows:

"FOURTH. It is further ordered, adjudged and decreed, that a writ of possession issue out of this Court, and under the seal thereof, directed to the Marshal, commanding him to summarily remove said defendant, his tenants, agents, and all persons holding or claiming to hold under him, from the said premises, and every part thereof, and to deliver possession of the said premises and every part thereof, to the said plaintiff."

XIII.

The said Circuit Court for said District erred in entering its decree as follows:

"FIFTH. It is further ordered, adjudged and decreed, that the said plaintiff have and recover from the said defendant the costs of this suit to be taxed, and that execution issue therefor. The premises hereinbefore referred to are known and described as follows: All that certain piece or parcel of land, being part of section twenty-eight (28), in township fifteen, (15), north range thirteen, (13), east of the 6th principal meridian, in the city of Omaha, and county of Douglas and state of Nebraska, described as follows: Beginning at the north-west corner of said section twenty-eight (28), thence south along the west line of said section, eight (8) chains and five (5) links, thence east eighty-five (85) degrees east, along the center line of Poppleton Avenue, to the center of Thirty-third (33) Street in

said city, thence north along the center of said Thirty-third Street, to the north line of said section, nine (9) chains and seventy (70)links; thence west along the said north line of said section, twenty (20) chains, to the place of beginning."

And the said Allen Root, appellant in this Court, prays that the decree aforesaid may be reversed, annulled and altogether held for naught, and that he may be restored to all things which he hath lost by the occasion of the said decree.

BRIEF.

I.

The first assignment of error directs attention to the insufficiency of the bill, *on its face*, and will be discussed with the second assignment of error, which, in legal effect, embraces the first.

II.

The contention in the second assignment of error is, that the Circuit Court erred in not sustaining the demurrer of Allen Root, appellant and defendant, to the bill of James M. Woolworth, complainant and appellee. The grounds of said demurrer are:

1st. That the bill does not state such a case as entitles appellee to the relief prayed for.

2nd. That the Circuit Court has no jurisdiction of appellant, or of the subject matter of the action.

3d. That it appears from the face of the bill that appellee has an adequate remedy at law; and

4th. That appellee's bill does not state facts sufficient to constitute a cause of action. The several grounds of demurrer will be discussed together.

We contend that there is a defect in the jurisdiction

of the Circuit Court which is *apparent* on the face of the bill, and that this defect was properly assailed by the demurrer. In support of this view, see Susquehanna & W. V. R. R. & Coal Co. vs. Blatchford, 11 Wall. 172.

In such cases a demurrer to the jurisdiction of the Court is valid.

Mitford's Equity Pleadings.

Equity will not entertain a bill solely for purposes that could be accomplished by an action in ejectment.

Hipps vs. Babin, 19 How. 271.

Lewis vs. Cocks, 23 Wallace, 466.

Ellis vs. Davis, 109 U. S. 485.

Killian vs. Ebbinghaus, 110 U. S. 568.

United States vs. Wilson, 118 U. S. 86.

Speigle vs. Meredith, 4 Biss. 120.

A bill in equity cannot be sustained in the Circuit Court to recover possession of real estate, the title to which, asserted by the plaintiff, is not an equitable but a legal title.

Ellis vs. Davis, 109 U. S. 485.

A bill in equity will not lie if it is in substance an ejectment bill, and if the relief it seeks can be obtained at law by an action in ejectment.

Killian vs. Ebbinghaus, 110 U. S. 568.

A bill in equity is not the proper means to recover possession of land.

Lewis vs. Cocks, 23 Wallace, 466.

United States vs. Wilson, 118 U. S. 89.

It is the universal practice of courts of equity to dismiss the bill if it be grounded upon a merely legal title. In such cases the adverse party has a constitutional right to a trial by jury.

Lewis vs. Cocks, 23 Wallace 470.

Where a party brings a bill in equity complaining of an injury for which he has a plain, complete and adequate remedy at law, the bill must be dismissed.

Parker vs. Winnipisiogee Lake Cotton & Woolen Co., 2 Black, (67th U. S.) 545.

A court of equity will not entertain a bill, where the complainant seeks to enforce a merely legal title to land. Whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury.

Hipp et al. vs. Babin et al. 19 How. 271, 278.

Galt et al. vs. Galloway et al. 4 Peters, 339.

Grand Chute vs. Winegar, 23 Wallace, 375.

In general courts of equity will not assume jurisdiction where the powers of the ordinary courts are sufficient for the purposes of justice. And, therefore, it may be stated as a general rule, subject to few exceptions, that where the plaintiff can have as effectual and complete a remedy in a court of law, as in a court of equity, and that remedy is direct, certain, and adequate, a demurrer, which is in truth a demurrer to the jurisdiction of the court, will hold.

Story's Equity Pleadings, section 473.

Thayer vs. Smith, 9 Metcalf, 469.

So if a bill should be brought for the possession of land, which is commonly called an ejectment bill, it would be demurable; for the proper redress is at law.

Story's Equity Pleadings, §476.

Bracken vs. Bracken, 1 Pinney (Wis.) 584.

A court of equity has no jurisdiction of a bill to establish the title of plaintiff to, and recover possession of a tract of land, in a suit based on an equitable title, when the defendants are in possession without title, being naked trespassers.

Fussell vs. Gregg, 113 U. S. 550-554.

Fussell vs. Hughes, 113 U. S. 565.

Young vs. Porter, 3 Woods, 342.

The proposition that the court had no jurisdiction of the person of the defendant, or of the subject matter of this action, on the ground of citizenship, is sustained by the following decisions of the courts:

The Circuit Court of the United States has no jurisdiction of a suit between parties who are citizens of the same state.

Van Antwerp vs. Hubbard, 8 Blatchf. 285.

Livingston vs. Van Ingen, 1 Paine, 45.

Meresole vs. U. P. R. R. Co. 6 Blatchf. 356.

Teal vs. Walker, 10 Ch. L. N. 131.

Where all parties, plaintiffs and defendants in a suit, are citizens of the same State, the Circuit Court of the United States has no jurisdiction unless by reason of the subject matter. Where a judgment had been obtained in the Circuit Court of the United States for the District of Kentucky, in a suit brought by a citizen of Maryland against certain persons in Kentucky, and the judgment was afterwards perpetually enjoined at the instance of the defendants, and a bill was filed by a citizen of Kentucky against the original defendants, who were also citizens of Kentucky, this bill was properly dismissed by the Court for want of jurisdiction. "If a new party and

subject matter be brought before the Court by a supplemental bill, it must show that the Court has jurisdiction by reason of the citizenship of the parties to that bill."

Course et al. vs. Sledd et al. 4 Dallas, 22.

Dunn vs. Clark, 8 Peters, 1.

Wickliff vs. Eve et al. 17 Howard, 468.

When after all the pleadings are filed in a cause in the Circuit Court of the United States between citizens of the same State, it appears that the averments in the declaration which alone gave the Court jurisdiction are immaterial in the determination of the matter in dispute, and are made for the purpose of creating a case cognizable by the court, it is the duty of the Circuit Court to dismiss the bill for want of jurisdiction.

Robinson vs. Anderson, 121 U. S. 522.

That the complainant's bill does not state facts sufficient to constitute a cause of action in this proceeding, in favor of plaintiff and against defendant, is sustained by the following decisions of the courts.

To entitle plaintiff to equitable interposition under reformed procedure, he must show a proper case for the interference of a court of chancery, and one in which he has no adequate relief at law.

Dewitt vs. Hayes, 2 Cal. 463.

Where a party can find in a court of law a full and adequate remedy, a court of equity does not open its door to him.

Doggett vs. Hart, 5 Florida, 215.

Richmond vs. Dickerson, 1 Stockton's Ch. (N. J.) 507.

Where complainant in equity presents a case clearly cognizable at law, or where the defendant answers the

Bracken vs. Bracken, 1 Pinney (Wis.) 584.

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Where a party can find in a court of law a full and adequate remedy, a court of equity does not open its door to him.

Doggett vs. Hart, 5 Florida, 215.

Richmond vs. Dickerson, 1 Stockton's Ch. (N. J.) 507.

Where complainant in equity presents a case clearly cognizable at law, or where the defendant answers the

allegations of the bill, reserving the question of law to be considered on the final hearing of the case, should the court on the final hearing be of the opinion that there is not a case in equity made out, such as will entitle the complainant to relief, it should at once dismiss the bill.

Meux vs. Anthony, 11 Ark. 411.

A court of chancery does not possess any direct jurisdiction over legal titles. The Court may, perhaps, try titles to lands where they arise incidentally, but it is understood not to be within its province. The power is only to be exercised in difficult and complicated cases, affording peculiar grounds for equitable interference.

Bracken vs. Preston, 1 Pinney, (Wis.) 584.

Abbott vs. Allen, 2 Johns. Ch. 524.

The true test as to what is a case in equity is whether there is a plain, speedy, and adequate remedy at law.

U. S. vs. Howland, 4 Wheat., 108.

Gaines vs. Chew, 2 How., 619.

Williams vs. Benedict, 8 How., 107.

That the bill cannot be sustained against the defendant as a bill of peace, is fully established by the following points and authorities.

In regard to bills of peace between single adverse claimants, it may now be regarded as settled that, unless the title has been established at law, except where the rule has been changed by statute, the court will not interfere.

3 Pomeroy's Eq. Jur., Sec. 1394.

Possession as well as an established legal title is necessary to the maintenance of a bill of peace of this class.

3 Pomeroy's Eq. Jur., Secs. 1394, 1396.

Orton vs. Smith, 18 How. U. S., 265.

To entitle a party to maintain a bill of peace, it must be clear that there is a right claimed which affects several persons, and that a suitable number of parties in interest are brought before the court; for, if the right is disputed between two persons only, not for themselves and all others in interest, but for themselves alone, the bill will be dismissed, because it cannot then conclude any persons but the very defendants.

Cowper vs. Clerk, 3 P. Wms. 157.

Alexander vs. Pendleton, 8 Cranch, 468.

That this action cannot be maintained as a suit to quiet the plaintiff's title, and to declare that the defendant has not and never had any interest whatever in the lands described in complainant's bill, is evident from the well known rule that jurisdiction is only exercised by courts of equity when the estate or interest to be protected is equitable in its nature, or when the remedies at law are inadequate where the estate or interest is legal.

Whether or not the jurisdiction will be exercised depends upon the fact that the estate or interest to be protected is equitable in its nature, or that the remedies at law are inadequate, where the estate or interest is legal—a party being left to his legal remedy where his estate or interest is legal in its nature, and full and complete justice can thereby be done.

Dewitt vs. Hays, 2 Cal. 463.

Hinckley vs. Greaney, 118 Mass. 595.

The remedy by injunction to yield up or quit possession of land, and the writ of possession to summarily remove a defendant from land, are writs which are only granted by, and issued out of, courts of equity, in aid of a decree in chancery, where there has been a foreclosure

of equity of redemption, and a sale of mortgaged premises decreed, and the mortgagor, or defendant, or any person who has come into possession under him, pending the suit, refuses to deliver up the possession, on demand, to the purchaser under the decree. Such cases, it is believed, are the only ones that can be found, holding that a court of equity has power to dispossess a defendant of land by such process, and then only in immediate execution of the decree, at the same term at which it was rendered, or the next subsequent term thereafter, or after the sale of the land and confirmation thereof, in the same case in which the decree was made. In the present action fifteen years have elapsed since the rendition of the decree in this Court, in favor of Oliver P. Morton, and against Allen Root, the said Morton being then a resident of Indiana, and a citizen of that State, and Root of Nebraska. Root has been in possession of the land in controversy for more than twenty years, and for fifteen years since decree was rendered against him in favor of Morton. Yet the complainant in this action brings an original bill in his own name in this Court, alleging that he is a citizen of the State of Nebraska, and that the defendant Root is also a citizen of the same State, and asks in said bill, which is a new suit in all respects, that he have process to oust the defendant from possession, on the pretence that it is in aid of a former decree, which has been in all things executed and carried into effect according to the terms of said decree, as appears from the said bill and the records of Court. It may be contended, in order to sustain the present bill, that courts of law and equity have concurrent jurisdiction of actions like the present, and that by reason thereof equity will interfere, but by refer-

ence to the authorities, it will be seen that there is no substantial foundation for such position.

The principle may be stated in its broadest generality, that in cases where the primary right, interest, or estate, to be maintained, protected or redressed, is a legal one, and a court of law can do as complete justice to the matter in controversy both with respect to the relief granted and to the modes of procedure by which such relief is conferred, as could be done by a court of equity, equity will not interfere even with those peculiar remedies which are administered by it alone, such as injunction, cancellation, and the like, much less with those remedies which are administered both by it and the law, and which, therefore, belong to the concurrent jurisdiction.

Pomeroy's Eq. Jur., Vol. 1, Sec. 176.

Southampton Dock Co. vs. Southampton, etc., Board, L. R. 11 Eq., 254.

And the same doctrine applies under the reformed system of procedure.

Kyle vs. Frost, 29 Ind., 382.

Claussen vs. Lafrenz, 4 Greene (Ia.) 224, 225, 227.

See also, sustaining the general principle as stated above:

Grand Chute vs. Winegar, 15 Wall., 373.

Insurance Co. vs. Bailey, 13 Wall., 616.

Hipp vs. Babin, 19 How. (U. S.) 271.

In all cases where the plaintiff holds or claims to have a purely legal estate in land, and simply seeks to have his title adjudicated upon, or to recover possession, against an adverse claimant who also relies upon an alleged legal title, there being no equitable feature of fraud, mistake, or otherwise, calling for the application of

equitable doctrines or the granting of peculiar equitable reliefs, the remedy at law is adequate, and the concurrent jurisdiction of equity does not exist. A suit in equity under its concurrent jurisdiction will not be maintained to take the place of the action of ejectment, and to try adverse claims and titles to land which are wholly legal, and to award the relief of the recovery of possession.

Pomeroy's Eq. Jur. Vol. 1, Sec. 177.

Bowers vs. Smith, 10 Paige, 193, 200.

From the authorities hereinbefore cited and the rules and principles established by them, it is clear that the bill cannot be sustained upon any ground. It cannot be maintained as a bill to *quiet title*, because the complainant is not in possession and the defendant is, and because the bill itself alleges that the title of plaintiff has been twice quieted. It cannot be maintained as a *bill of peace*, because it is not of the class of bills of peace of which a court of equity will take cognizance, but it is of the class of which such courts have universally refused to take jurisdiction. It cannot be maintained as a *bill for possession*, because courts of equity have in all ages of equity jurisprudence refused to entertain such bills. It cannot be maintained as a *bill to carry a former decree* into execution, because such decree has been fully executed in all respects in accordance with the relief prayed in the action to obtain that decree, and according to the terms of the decree itself, as set forth in the bill and records of the Court.

The Court is without jurisdiction to hear and determine the merits of this case, because both parties are citizens of the State of Nebraska, as alleged in the bill;—because complainant shows by his bill that his remedy is

at law, by ejectment instead of in equity;—because complainant has not made such a case by his bill as would authorize the court to hear and determine the same, as a court of equity, even though complainant and defendant were citizens of different States.

III.

The Court erred in admitting and considering deed from Thomas McCullough, Eliza M. Morton and William A. Peelle, executors of the last will and estate of Wm. S. T. Morton. This deed was dated June 4, 1879, and undertook to convey an undivided half interest to James M. Woolworth. No letters testamentary were ever issued, and there was no order of Court authorizing the sale as made by the executors. The laws of Indiana and Nebraska bearing upon these questions are cited and discussed elsewhere.

It is unnecessary to state that the decree of May 8, 1873, had been completely carried into effect long before the execution of the deed from executors to Woolworth. From any standpoint the deed is without legal value and should not have been considered by the Court. (See executors deed, in Exhibits to complainant's testimony, record P, 382-486.)

IV.

The Court erred in admitting and considering the deed from Oliver P. Morton and wife, to James M. Woolworth. This deed was a quit-claim deed dated June 24, 1873, and purported to convey an undivided one half of the land in controversy—after the litigation between Morton vs. Root had terminated in a final decree, void or otherwise. In a word—this deed cannot be used as a

foundation for a supplemental bill in equity. Morton, if living and a citizen of Indiana, and the true owner of the decree, could not have filed, in 1889, a supplemental bill to carry the decree into effect, after everything had been done, required by the decree of the Court, to be performed. (See deed of Morton and wife to Woolworth, Record, page 382 to 486.)

V.

The Court erred in admitting and considering the confirmatory deed of Thomas McCullough and William A. Peelle, two of the executors of the will and estate of Wm. S. T. Morton. (See deed in Exhibit UU to complainant's testimony, Record, p. 382 to 486.)

It is sufficient to suggest that the deed neither establishes nor tends to establish any issue involved in the cause now before the Court.

VI.

The Court erred in admitting in evidence transcript of record and decree of the District Court in the Territory of Nebraska, in case of Oliver P. Morton vs. Roswell G. Pierce, Heman Glass et al. (Record 382 to 486.) As Oliver P. Morton, at no time, pending his suit vs. Allen Root had *any* title to the property involved in *that* litigation, it is immaterial what literary controversies he may have had in the courts prior to his legal assaults upon Allen Root.

VII.

The Court erred in admitting in evidence and considering the certified transcript of the proceedings, record, testimony, &c; opinion of Circuit Judge Dillon and decree (May 8, 1873) of the U. S. Circuit Court in the case

of Oliver P. Morton vs. Allen Root; if it be true, as we think evident, that the decree was obtained by fraud, neither it nor any of the proceedings ought to be considered as a basis upon which to sustain a supplemental bill.

(See record in case of Oliver P. Morton vs. Allen Root, in Exhibit to Complainant's testimony. Record p. 382 to 486.)

VIII.

The Court erred in admitting in evidence and considering the testimony of Jas. M. Woolworth, complainant, (which testimony is made a part of this assignment of error), from questions number 216 to number 218, inclusive. (See Record, pages 58, 301.)

The testimony of this witness is tinged with romance. That he was "indebted to his imagination for his facts" we do not affirm, and yet there are phases of his evidence that can be explained upon no other theory. A careful analysis of his whole testimony shows that it invites criticism both as to his memory and *his* methods. More than a quarter of a century ago he became the attorney for Governor (afterwards the distinguished U. S. Senator) O. P. Morton of Indiana, in connection with certain property now the subject of this litigation. In course of time, Woolworth, the attorney, buys from his trusting client, for the *graceless* sum of fifty dollars, (which sum nothing but the credulity of youth would say was ever paid) his client's interest. From this transaction two inferences are to be drawn: Woolworth either represented to his client that the property had no value, or he concealed from him its *real* value. If either of these positions be true, what standing has Woolworth in a court of equity, or in the high court of morals?

The property *is* valuable and Woolworth *is* a deeply interested witness. In 1890 how well he remembers, at random and long range, the contents of papers *mysteriously* lost (if they ever existed) many years ago, and how he *failed* to remember in 1870 that the year previously Morton and wife had deeded their property to W. S. T. Morton. His testimony, if considered at all, should be received *cum grano salis*.

We contend that his testimony is not competent, and if it were, has no legal value. No evidence could give vitality to a decree which had been executed, or to a decree void at the date of its rendition.

If the purpose of the present bill is to carry a former decree into effect, then the principles of the former decree must be taken as a basis for procedure. For, if these principles were not followed the effect would be, practically, to impeach the decree rather than to sustain it. In Equity pleading these principles are elementary.

The former decree was to remove a cloud from Morton's title—nothing more. If the judicial proceedings leading to the decree were valid, the cloud was removed by the decree and by the action of the master, who under the decree, executed a deed to Morton. Under the decree nothing remained to be accomplished. With this view of the law Mr. Woolworth's testimony (or literary disertations) should have been excluded.

IX.

The ninth, tenth, eleventh, twelfth and thirteenth assignments of error all relate to the error of the Court in entering its final decree. Of course if the Court had no jurisdiction, as we contend, the demurrer should have been sustained and the bill dismissed. If the Court had

no jurisdiction by reason of the citizenship of the parties —the bill should have been dismissed because it was without equity on its face. We are satisfied, however, that upon the pleadings and evidence there should have been a decree for the defendant—upon the ground that the former decree in case of Morton vs. Root, was *absolutely* void.

Allen Root had acquired title by virtue of the statute of limitations. We will here discuss this feature of the case.

ADVERSE POSSESSION.

We contend that as no steps were ever taken by Morton, under judicial proceedings, or otherwise, to disturb the actual possession of Allen Root, the statute of limitation was neither suspended nor interrupted.

The Supreme Court of Missouri, in case of Mabary vs. Dollarhide, 98 Mo. p. 198, *held* that a judgment in ejectment, not followed by any writ, nor by taking possession under it, does not suspend the statute of limitations.

The Supreme Court of Kentucky, in the case of Smith vs. Hornback, 4 Littell, 232, *held* that a judgment in ejectment, never executed, and under which possession has never been demanded, does not stop the running of the statute of limitations. The case of Morton vs. Root was a void proceeding resulting in May 1873, in a void decree to remove a cloud from Morton's *supposed* title, with which he had parted before his bill was filed, and a title which he did not have when the final decree was rendered. There was nothing in the decree that contemplated disturbing the continuity of Root's possession. In Smith vs. Trabue, 1 McLean 87, it was held that a judgment in an action of ejectment against a defendant, who

holds adversely, does not of itself suspend the statute of limitations. To do this there must be a change of possession. The following cases support the same view:

Dol vs. Reynolds, 27 Ala. 354.

Jackson vs. Haviland, 13 Johnson, N. Y. 229.

The decree quieting the title in Morton would not break the continuity of Root's possession, nor stop the running of the statute of Limitations.

The evidence shows that Allen Root has, since July 2, 1866, (at which time his deed from Heman Glass was recorded) exercised acts of ownership over the property in controversy.

The testimony further shows that prior to the rendition of said decree, on May 8, 1873, from 1869 up to the present time, Allen Root has been in possession of the premises in controversy, under and by virtue of a deed therefor, and that he held them in his own actual possession, either personally or by tenants, and that he cultivated a portion of the premises prior to the time of the rendition of said decree.

The testimony shows that the said Allen Root enclosed the larger portion of the premises in controversy with a fence and occupied it in divers ways from 1869 up to the present time. That from 1873 up to the year 1886 or 1887, it was occupied by his tenants holding under him. That one of his tenants was named Pierce; that another was Henry A. Akin; that another was named Upton, and that each and all of these parties held under him as tenants. That they occupied the houses, cabins, or tenements upon said premises, as his tenants for more than ten years, prior to the filing of the bill in the present proceeding.

The testimony also shows that Allen Root cultivated that portion of the premises which was not enclosed by a fence and had them occupied for more than ten years in divers ways last before the filing of the complainant's bill in this action.

Under this possession which was had under a deed, which in any event, constitutes color of title, Allen Root acquired title to the premises by prescription or by virtue of the statute of limitations, if the Court should hold that he did not have a good and perfect title by virtue of his deed from Heman Glass to him for the premises in controversy, as against the appellee, who has never been in actual possession of any part of the premises in controversy.

From a further examination of the testimony in this cause and particularly the certified transcript of the proceedings in the case of Heman Glass vs. Roswell G. Pierce in the Territorial District Court of Douglas County, it will appear as clearly as it appears in the other action brought in that court by Oliver P. Morton vs. Roswell G. Pierce, that the writ of attachment issued in that action, had been levied because the same notation was made in that cause brought by Heman Glass vs. Pierce upon the appearance docket, that an attachment had been issued and returned served, as there had been in the action brought by Morton vs. Pierce; as the Court in that action rendered a judgment against Roswell G. Pierce in favor of Heman Glass, and as there had been certain property sold under attachment and the proceeds of the sale thereof had been applied to the payment of that judgment, leaving a large balance due Heman Glass thereon, and as thereafter a general execution and order to sell the premises in con-

troversy was issued out of said Territorial District Court in due form of law, and as the premises in controversy here sold under that general execution to sell the same to Heman Glass, and the sale thereof duly confirmed by that Court, then, surely, Heman Glass, by virtue of the Sheriff's deed executed to him for the premises in controversy, had color of title thereto, even though he might not have had a good and perfect title to said premises by virtue of his said Sheriff's deed. When Heman Glass conveyed the premises in controversy by his warranty deed to Allen Root he acquired color of title to the premises in controversy, if he did not acquire a good and perfect title thereto by virtue of said deed. The testimony taken in this cause on behalf of Allen Root, clearly shows that shortly after the recording of his deed from Heman Glass to him for the premises in controversy, he entered into the actual possession of all of said premises, and cultivated a portion thereof, and enclosed a very much larger portion thereof by fences. And that from the first day of May, 1869, *continuously* up to the filing of complainant's bill, he held and occupied and used the same by tenants and by himself openly, notoriously and adversly to all the world, as his own, and that it was generally understood by those who made maps of the city and its environs, that Root claimed to own and did own the premises in controversy in the year 1870. In that year as shown by the map introduced in evidence in behalf of Allen Root in this cause, made by Byron Reed, one of the witnesses for the complainant in this proceeding, Allen Root's name appears on the premises in controversy as is shown upon that map, as being the owner thereof, and this is a circumstance to show that then at least Allen Root claimed

to own, and was believed to be the owner of the premises in controversy by said map maker. From other testimony taken in this cause on Root's behalf, it appears that all those who knew the premises in controversy at that time, believed them to be owned by Allen Root. From other testimony taken in this cause, it clearly appears that Allen Root exercised acts of ownership over the premises, by cutting wood thereon, and pasturing same for a portion of the time, and having the same occupied by his tenants from 1874 continuously, up to the year 1886, and occupying the same premises personally after having fenced the whole of the premises, and building a house thereon, from about that time up to the filing of complainant's bill, it is clear that Allen Root has, at all times claimed to be the owner of the premises in controversy, and has held and occupied the same adversely to complainant in this bill, for more than 19 years last past, before the commencement of this proceeding.

Root's claim of right and color of title is founded upon a warranty deed from Heman Glass under date of December 13, 1864, and duly entered of record in the recorder's office of Douglas County, Nebraska, on the 2d day of July, 1866.

Root went into possession of the land in question under his deed of conveyance from Glass by entering upon said land and cutting his winter's wood during the winter and spring of 1865; also, during the following winter and spring.

During the year 1867 he fenced about one-half of the land.

In 1869 he used the part fenced as a pasture and for several years thereafter.

In 1869 he commenced to grub and clear the part not fenced.

In 1870 and 1871 he cleared from two to two and one-half acres and planted some potatoes upon the land cleared.

The fence through the timber was made of trees felled in a line so as to stop cattle and horses.

This fence was around three sides except about half of the east side, and that part was a post and board fence. The posts were cut from the land.

The fence on the south line was made of brush.

The tract fenced embraced nearly all of the east one-half.

The post and board fence was commenced by Root in 1866, and finished in 1868.

At all times up to 1873, Root cut wood and posts from the land, both within and without the enclosure.

From 1875 to 1887 continuously, Root has had a family on the land unenclosed, and during a portion of the time he had a family on the land enclosed.

When in Omaha Root made this land his stopping place.

He cut wood, posts and poles from the land every year. The fence was pretty much down in 1879 and 1880. Root continued to take his wood and timber from it, and in the spring of 1888 he built a post and wire fence around it and a house upon the land and since that time has resided upon the premises with his family.

Upon the land enclosed, Root had several families between 1875 and 1883.

No one except Root ever exercised any acts of ownership over these premises.

No one has ever demanded possession of the land.

Root has always occupied the same as his own and treated the land as belonging to him in every respect.

See Allen Root's testimony, Record pages 59, 157, 178, 267.

O'Brien's testimony, Record p. 79.

Marsh's Ev., Record, 95.

Tuttle's Ev., Record, 108.

Avery's Ev., Record, 115.

Griffin's Ev., Record, 119.

J. C. Root's Ev., Record, 125.

Gallagher's Ev., Record 137-155.

H. Avery's Ev., Record, 172.

The fence was repaired from year to year.

Others cut timber, but it was the business of those on the land for Root to see that no one took timber therefrom.

In 1885 a small house and barn was built upon this land and occupied by one Upton and family in the interest of Root.

Gallagher's Ev., Record, p. 137-155.

Ford vs. Wilson, 35 Miss. 409, (72 Am. Dec. 137) was ejectment. Judgment for Wilson, who held the government title. Ford's title seems to have originated in a verbal exchange of lands between Wilson, Sr., and one James Radcliffe. Adverse possession was the defence.

"J. N. Ratcliffe, after proving the possession of the locus for ten or fifteen years by the heirs of James Ratcliffe, states that afterwards, most of the fences being burned down, the place was not occupied for about six

years, from 1846 to 1852 or 1853, until he sold it to Thomas J. Ford, the appellant; that he thought he owned it, and believed that he had conveyed it to Ford by the deed read in evidence. He stated further that William Wilson never occupied said land from the time his father James Ratcliffe, first occupied it in 1834. This action was commenced on the fifteenth day of November, A. D. 1857.

Waiving, then, all other questions, we regard the adverse possession of this defendant, and those under whom he claims, as conclusive upon the rights of the plaintiff. In the case of Ellis vs. Murray, 28 Miss. 129, under the third section of the act of limitations, passed in 1844 (Hutch. Code, 829), it was held that "actual adverse possession for ten years vests a full and complete title to the land in possession; and a party having had such possession might sue for the recovery of it at any time within the period limited in the first section, without further evidence of his title than that he had had ten years in actual adverse possession; that it was intended to secure a right of property by the possession of ten years."

"It is insisted, however, that the statutory title arising from ten years' actual adverse possession did not vest in the appellant in this case, because, notwithstanding the actual adverse possession from 1834 to 1846 in his favor, there was then a period of between six and seven years after the fence was burned when no one occupied the premises. Therefore the resumption of possession, in 1852 or 1853, deducted from the whole possession proved, would not leave sufficient time for the operation of either the act of 1822 or the act of 1844. The question of ad-

verse possession is one depending on the intention of the possessor, and the knowledge, or the means of knowledge on the part of the owner of the land; and it is therefore a question of fact to be determined by a jury, as the best means of ascertaining the truth: Angell on Limitations, 477, notes 2 and 3 and numerous cases cited. * * *

"A continued residence on the land is not necessary, it being sufficient that the land has been enclosed in such manner as to give publicity to the possession:" Angell on Limitations, 482, and cases cited.

"Making improvements or receiving rents for a considerable length of time, would be sufficient without residence. In the case of a dwelling house in a city, the possession of it continues so as to give the possessor the benefit of the statute of limitations, although the house may not have been occupied all the time by himself, or by a succession of tenants under him, without intermission; and direct proof of occupancy during the whole period is not necessary:" Angell on Limitations, 482.

"We think that the possession of the land for about twelve years, in the knowledge of William Wilson, (as whose heir appellee seeks to recover) clearing, cultivating and using it adversely to his rights, notoriously and openly, without any attempt upon his part to assert his title, affords the strongest possible presumption of his intended acquiesence. We think, further, that the absence of all evidence tending to show an abandonment of this notorious adverse possession enjoyed for so long a period under the very eyes of the appellee's father, by the appellants, that the accidental circumstance of the destruction of the

fence by fire, which for a time, interrupted the active occupation of the premises, and rendered them unfit for use, is a circumstance of no material moment."

The judgment was reversed, cause remanded, and a *venire de novo* awarded.

Beaupland vs. McKeen, 28 Pa. St. 124, (70 Am. Dec, 115) was an action to recover balance of purchase money. The defense was that part of the premises were held adversely by third parties. The court used the following language:

"If the fact be that those in possession of the Patterson tract at Bear Creek made such use of the interference as owners ordinarily make of their adjacent timber lands —taking fire-wood, fence-rails, or lumber from it for the use of their mill, for a period of one and twenty years, this would be possession, and would give title under the statute of limitations. Constructive possession would not oust the real owner of the Edgerton survey, but actual possession would, and such acts as I have enumerated have repeatedly been held to constitute actual possession. The marking of lines and payment of taxes, would be additional assertions of ownership, which would help to make out the actual possession."

Hoey vs. Furman, 1 Pa. St. 295 (44 Am. Dec. 134) was ejectment. Each party litigant claims title by dissiezin—judgment for Furman, who was plaintiff below. Furman and his ancestors, through whom he claims title, never lived upon the land, but held their possession by clearing, fencing and cultivating certain portions of it.

"On the argument of the cause, it was contended, that because the defendants in error, or their father, have

never resided on any part of the Staybrook tract, but on an adjoining one, they could have no right that would entitle them to recover, unless possibly what they had cleared and cultivated; but as the plaintiff in error had not encroached thereon, they were not entitled to recover. But it is a great mistake to suppose that the residence of a disseisor upon the land into which he had wrongfully entered, is in the slightest degree necessary to give him any right thereto, that he may not otherwise have. Even as against the owner, the residence of the parties making the wrongful entry into the land has never been held or deemed necessary to constitute a disseisin. Residence on the land has nothing to do with it, because the owner may be as completely evicted, and removed from his possession of the land, by clearing, fencing and cultivating it, without the wrongdoer's residence thereon, as if he resided thereon at the same time. And more especially may this be the case where the land is in a wild and unimproved state, without any building thereon whatever. Nay, further, a disseisor may doubtless acquire a good title to the land against the legal owner without any residence thereon under the statute of limitations.

Webbs vs. Hynes, 9 B. Mon. 388, (50 Am. Dec. 515) was ejectment. The land was an island in the Ohio river. Defendant used the land for a pasture.

"If the land in controversy was not in the actual possession of the elder patentee, or any person claiming under him, and was entered upon by Ford, under whom the defendants claim, after his purchase from Rumsey, the junior patentee, with an intention to take possession of it, and if he placed his stock upon it for that purpose, and

continued to use it in the mode, and at such times as was proper, considering its nature and locality, claiming it as his own, and if no fence was necessary for its enjoyment, and such possession was at no time abandoned by him, or those claiming under him, but was continued uninterruptedly for twenty years, such possession would form a complete bar to the plaintiff's recovery.

If the stock was withdrawn from the island at certain seasons of the year, whether such an act would amount to an abandonment of the possession, would depend entirely on the intention of the defendant, to be collected from his acts. If it was done because the island could not be safely used longer, or the grass was exhausted, or from other prudential motives, and with the intention still to retain the possession and use it the following season, or as soon thereafter as it could be safely and beneficially used, it would clearly not amount to an abandonment of the possession."

Clement vs. Perry, 34 Iowa, 564, was an action for partition. The plaintiff Clement claimed as heir of his father. The plaintiff Stone claimed title to one-third in fee, the dower of, by conveyance from, the widow, Charity Clement. The decree of divore to Charity Clement undertook to settle upon her the land in question, but did not do so.

"It is furthermore shown that the forty acres in controversy is timber land and uninclosed; that Prudence Clement, from the time of the decree up to her conveyance of it, used it for ordinary timber land purposes, cutting wood and timber thereon, and claimed to own it; that James W. Clement, after the conveyance to him also

used it for the same purposes." * * *

"The rule of law is very well settled, that where a person claiming land exercises acts of ownership of it, by the use of it for the purposes to which it is adapted, he is in such actual occupancy of it as will even bar an action after the statutory time. Such possession is as actual as that by inclosure."

Clark vs. Potter, 32 Ohio St. 49 was an action to redeem. The defence was adverse possession.

The Court said: "As the character of the possession depends on the nature and situation of the property, and the uses to which it can be applied, or to which the owner may choose to apply it, it is evident that resort must be had to the usual and ordinary conduct of owners of such land to determine if it is sufficient.

If this possession comports with the ordinary management of similar lands by their owners, it furnishes satisfactory evidence of adverse occupation.

When the land is partly improved and partly unimproved, an entry, even under a void deed, describing the whole, and acts of ownership under color of title derived from this deed over the whole—such as payment of taxes, preventing trespasses on the unimproved part, and using the improved part—is satisfactory evidence of adverse occupancy, when the opposite party, with knowledge of these acts, makes no claim, but acquiesces for more than twenty-one years.

Angell on Limitations, Par. 398.

Noyes vs. Dyer, 25 Me. 468.

Kennebeck vs. Laboree, 2 Me. 275.

Spear vs. Ralph, 14 Vt. 400.

Chisholm vs. Bulloph, 12 Vt. 231.

Proprietors vs. Springer, 4 Mass. 415.

Counsel for plaintiffs strenuously insist that as to the forty acres not sold in 1853 to Baker and Prentice, there has not been that *continued possession* requisite.

The deed to the whole tract was executed December 4, 1844. Prior to that Potter had employed an agent to look after the property, and had paid taxes since 1843.

The improved part, mostly these forty acres, had been continuously occupied by tenants since the spring of 1845 to the winter of 1863-4, when the house was torn down by the neighbors by reason of objectionable tenants to whom it had been sublet, and the material was afterwards moved off by the tenant in April, 1864.

About the same time most of the fencing was stolen for fire wood, and the greater part of the cleared land was an open common. It also appears that from the time the house was pulled down, in the winter of 1863-4, to the spring of 1865, no tenant actually resided on the land, although during all that time the mortgagee, through his agent, continued to pay taxes and to exercise all other acts of ownership and control that was possible under the circumstances.

No intention was entertained of abandoning the property. No adverse entry or claim was then or at any time made. There was no disseisin or ouster. The acts of a mob and of thieves had made it temporarily unfit for actual residence."

Wait's Actions and Defenses, Vol. 6, p. 438: "Every possession, then, is adverse, and entitled to the peaceful and benignant operation and protecting safe-

guards of the statute, which is not in subservience to the title of another, either by a direct acknowledgment of some kind, or an open or tacit disavowal of right on the part of the occupant; and it is in the latter case only that the law adjudges the possession of one to the benefit of another.

LaFrombois vs. Jackson, 8 Cow. 589, 618.
And see United States vs. Arrendondo, 6 Pet. 691, 743.
Rogers vs. Hilhouse, 3 Conn., 398, 403.
Ray vs. Barker, 1 B. Monr. 364.
Read vs. Thompson, 5 Penn. St., 327.
McIver vs. Ragan, 2 Wheat. 25, 29.
Turner vs. Hall, 60 Mo., 271.
Gulf R. R. Co. vs. Owen, 8 Kans., 409.

The lessee of *Ewing and Burnet*, 11 Pet. 41, was ejectment. The defense was adverse possession under color of title for the statutory period.

"During this time he also claimed the exclusive right of digging and removing sand and gravel from the lot; giving permission to some, refusing it to others; he brought actions of trespass against those who had done it, and at different times made leases to different persons, for the purpose of taking sand and gravel therefrom, besides taking it for his own use, as he pleased. This had been done by others without his permission, but there was no evidence of his acquiescence in the claim of any person to take or remove the sand or gravel, or that he had ever intermitted his claim to the exclusive right of doing so; on the contrary, several witnesses testified to his continued assertion of right to the lot; their

knowledge of his exclusive claim and their ignorance of any adverse claim for more than twenty-one years before the present suit was brought." * * *

"An entry by one man on the land of another, is an ouster of the legal possession arising from the title, or not, according to the intention with which it is done; if made under claim and color of right, it is an ouster; otherwise, it is a mere trespass; in legal language the intention guides the entry, and fixes its character. That the evidence in this case justified the jury in finding an entry by the defendant on this lot as early as 1804 cannot be doubted, nor that he claimed exclusive right to it under color of title, from that time until suit brought. There was abundant evidence of the intention with which the first entry was made, as well as of the subsequent acts related by the witnesses, to justify a finding that they were in assertion of a right in himself; so that the only inquiry is as to the nature of the possession kept up. It is well settled that to constitute an adverse possession there need not be a fence, building or other improvement made (10 Pet. 442); it suffices for this purpose that visible and notorious acts of ownership are exercised over the premises in controversy for twenty-one years, after an entry under claim and color of title. So much depends on the nature and situation of the property, the uses to which it can be applied, or to which the owner or claimant may choose to apply it, that it is difficult to lay down any precise rule adapted to all cases. But it may with safety be said that where acts of ownership have been done upon land which from their nature indicate a notorious claim of property in it, and are con-

tinued for twenty-one years, with the knowledge of an adverse claimant without interruption, or an adverse entry by him, for twenty-one years; such acts are evidence of an ouster of a former owner, and an actual adverse possession against him."

CONCLUSION.

We ask the attention of the Court to the consideration of the following suggestions:

Oliver P. Morton by his deed on the 19th day of August, 1869, conveyed the property in controversy to Wm. S. T. Morton. Said deed was a valid one under the laws of Indiana, where no witnesses were required, and being valid where made was valid under the laws of Nebraska. Green vs. Gross, 12 Neb. 123.

The Court in this case says: "If no witness is required to a deed in that State (where the deed is made,) none will be required to a deed executed there for the conveyance of land in this State. The reason is the statute prescribes the mode of conveyance, and that a deed valid where made, shall be effectual to pass the title to land in this State." See section 4, chapter 73 Compiled Statutes of Neb., 1886.

Oliver P. Morton had no title at any time during the pendency of his suit against Allen Root; the Court, therefore, was without jurisdiction to render its decree of May 8, 1873. The decree in that case having been obtained on the representation that Morton was the owner of the property, was a fraud upon the Court, and the decree being fraudulent can be defended against by Root in this suit. See case of Marshall vs. McGee, 33 Hun. 354.

In this case A foreclosed a mortgage he had assigned

to B before such foreclosure. The Court held that the decree of foreclosure should be set aside for fraud. "When a judgment or decree of any court, whether inferior or superior, has been obtained by fraud, the fraud is regarded as perpetrated upon the court as well as upon the injured party. The judgment is a mere nullity, and it may be attacked and defeated on account of the fraud in any collateral proceeding brought upon it or to enforce it, at least in the same court in which it was rendered. Pomroy's Eq. Jurisprudence, vol. 2, section 919. "A judgment or decree obtained by fraud upon the court, binds not such court or any other, and its nullity upon this ground, though it has not been set aside or reversed, may be alleged in a collateral proceding." Kerr on Fraud and Mistake, p. 293.

A judgment obtained by fraud cannot be made the basis of recovery. Drinkard vs. Ingram, 21 Texas 650. The fact of being a party to a judgment or decree does not estop a person from obtaining, in a court of equity, relief against fraud in obtaining it. Johnson vs. Waters, 111 U. S. 640; League vs. DeYoung, 11 How. 185.

* * In such cases the Court will scrutinize the conduct of the parties, and if it finds that they have been guilty of fraud in obtaining a judgment or decree, it will deprive them of the benefit of it, and any equitable advantage which they have derived under it. Johnson vs. Waters, 111 U. S. 640.

The jurisdiction of any Court exercising authority over a subject may be inquired into in any other Court, when the proceedings of the former are brought before the latter by a party claiming the benefit of such proceedings. Elliot vs. Piersol, 1 Pet. 328. In cases of

fraud a final decree of the U. S. Supreme Court can be re-examined at a subsequent term. Maguire vs. Tyler, 17 Wall. 253. The deed from Oliver P. Morton to Woolworth under date of June 24, 1873, purports to convey to the latter only an undivided one-half interest in the property. The deed from the executors and executrix of Wm. S. T. Morton to Woolworth under date of June 4, 1879, only purports to convey to him an undivided one-half interest in the property. The deed under date of June 4, 1879, from the executors and executrix of Wm. S. T. Morton to Woolworth of the undivided one-half interest, is void, for the reason that the executors and executrix had no authority to make the conveyance.

No letters testamentary were issued. No order of Court was obtained authorizing the sale as made by executors.

The statutes of Indiana bearing on the subject are as follows:

PETITION TO SELL LAND TO PAY DEBTS.

Sec. LXXV. Whenever any executor or administrator shall discover that the personal estate of the decedent is insufficient to pay the liabilities thereof, the Court having jurisdiction shall order to be sold the whole or any part of the real estate of the deceased, upon such executor or administrator filing a petition therefor, either in vacation or during term time, setting forth:

First. The amount of personal property which has come to his hands.

Second. The amount of debts outstanding against the deceased, so far as the same can be ascertained, and the insufficiency of the personal estate to pay the same.

Third. A description of the real estate of the deceased, liable to be made assets for the payment of his debts, or so much thereof as the executor or administrator may deem it necessary to sell; the title which the deceased had therein at his death; and if the same was inventoried and appraised with the personal property, the amount of such appraisement, and if not, the probable value thereof.

Fourth. The names and ages of the heirs, legatees, or devises, if any, of the deceased; or if they are unknown, the fact shall be so stated.

Fifth. Such clauses in the will, if there be any, as require a specific distribution of the personal, making it necessary to sell the real estate to pay such liabilities.

NOTICE OF PETITION.

Sec. LXXVI. No order to sell such real estate shall be made until the notice of the time and place of hearing such petition shall have been given by three successive publications in a newspaper printed in the county, or if there be none printed therein, in a newspaper nearest thereto, in this State, thirty days before the hearing of such petition, and by posting up written or printed notices thereof in three public places in the town where such real estate is situate.

SALE OF REAL ESTATE DEVISED.

Sec. XCII. When real estate or any interest therein is devised by the will, or directed to be sold for the payment of debts or legacies, the executor shall proceed to dispose of the estate and apply the same according to the provisions of the will.

Sec. XCIV. Sales of such real estate, as to giving

notice, conveying, taking notes and mortgages, return and confirmation or vacation, shall be conducted in like manner as herein provided in relation to sales by an administrator for the payment of debts, unless by the terms of the will different directions are given; but no petition or notice of the filing thereof, shall be required.

It is to be remembered that the will does not convey the property to the executors in trust, nor for the purpose of carrying out any trust. There is in the will a simple provision, authorizing the executors to sell the real estate. The provision of the will, therefore, must be governed, so far as the laws of Indiana are concerned, by the two last sections above quoted. By the last section quoted it will be observed that such sale is to be conducted in the manner provided for in sections 75 and 76.

There was no compliance or attempted compliance with sections 75 and 76 in the case at bar; hence the conclusion must stand admitted, that the sale was not made under any authority of the laws of Indiana, but was in direct conflict therewith.

The statutes of Nebraska bearing upon this subject are the following:

Sec. CXLV. (Proceedings on probate of foreign will.) When a copy of such will, and the probate thereof, duly authenticated, shall be produced by the executor, or other person interested in such will, to the probate court, such court shall appoint a time and place of hearing, and notice shall be given in the same manner as in case of an original will presented for probate.

Sec. CXLVI. (Same.) If, on hearing the case, it shall appear to the court that the instrument ought to be allowed in this State as the last will and testament of the

deceased, the copy shall be filed and recorded, and the will shall have the same force and effect as if it had originally been proved and allowed in the same court; Provided, That all decrees heretofore made in this State, allowing wills and admitting the same to probate, under the provisions of this and the two preceding sections, without the previous filing of the copy of the probate mentioned in section one hundred and forty-five (145) of this chapter, shall be as legal and valid and shall have the same force and effect as if such copy had been duly filed prior to the making of such decree and the allowing of such will. (Amended 1885, chap. 48).

Sec. CXLVII. (Same.) When any will shall be allowed, as mentioned in the preceding section, the probate court shall grant letters testamentary, or letters of administration, with the will annexed, and such letters testamentary, or letters of administration shall extend to all the estate of the testator in this State; and such estate, after payment of his just debts and expenses of administration, shall be disposed of according to such will, so far as such will may operate upon it, and the residue shall be disposed of as is provided by law in cases of estates in this State, belonging to persons who are inhabitants of any other Territory, State or country.

Sec. CLXIII. (Issuance of letters). When a will shall have been duly proved and allowed, the probate court shall issue letters testamentary thereon, to the person named executor therein, if he is legally competent, and he shall accept the trust and give bond as required by law.

Sec. CLXIV. (Bonds.) Every executor, before he shall enter upon the execution of his trust, and before

letters testamentary shall issue, shall give bond to the Judge of Probate in such reasonable sum as he may direct, with one or more sufficient sureties.

Sec. CLXVII. (Refusal of executor to act.) If a person named executor, in any will, shall refuse to accept the trust, or shall, for the space of twenty days after the probate of the same, neglect to give bond as required by law, the Probate Court may grant letters testamentary to the other executors, if there be any who are capable and willing to accept the trust, and if there be no such other executors who will give bond, the Court may commit administration of estate, with the will annexed, to such person as would have been entitled to the same if the testator had died intestate.

Sec. CLXVIII. (Minors.) When the person named executor in any will is under full age at the time of proving the will, administration shall be granted with the will annexed, during the minority of the executor, unless there shall be another executor who shall accept the trust and give bond, and in that case the executor who shall give bond, shall have letters testamentary, and shall administer the estate until the minor shall arrive at full age, when he may be admitted as joint executor, on giving bond according to law.

Sections from 69 to 83, relate to the order to show cause, the service of the order, the hearing of the testimony, and the other proceedings.

Sec. LXXXIV. (Sale.) Such sale shall be in the county where the lands are situated, at public vendue, between the hours of nine in the morning and the setting of the sun the same day, and said sale shall be held open for one hour within said specified time, which hour shall be

stated in the notice of the sale provided for in the preceding section.

Sec. CI. (Sale by foreign executor.) Upon filing such authenticated copy of his appointment, such foreign executor or administrator may be licensed by the same court to sell real estate for the payment of debts or legacies, and charges of administration, in the same manner, and upon the same terms and conditions as are prescribed in the case of an executor or administrator appointed in this state, excepting in the particulars in which a different provision is hereinafter made. (See 16 Nebraska 420.)

It will be seen from the foregoing provisions that the entire manner of disposing of real estate by sale, by executors or administrators, is covered by the statutes. There is no provision in the statutes of Nebraska contemplating or recogizing a sale made in any other manner.

It has been the accepted law in this State for twenty years that all sales of real estate, by executors, must be made under the provissons the statute.

It was conceded in this case that the sale of the real estate in controversy was necessary for the paying of the debts of the deceased, and that the proceeds of such sale were used for that purpose. The sale, in fact, was therefore a sale made for the purposes provided for in the statute.

To say that the testator, by his will, could authorize the executors to sell the real estate without complying with any one of the provisions of the statute, would lead to the conclusion that the testator was clothed with the power by will, to supercede all the provisions of the statute,

and he can thus dispense with the petition to the Court, and he could dispense with the license; he could dispense with the probating of the will; he could dispense with the giving of bond; he could dispense with the order of confirmation, and thus give the executor the absolute power to dispose of the real estate, without throwing around it the guards and protection which the law has provided for the benefit of the creditors and the heirs. Such a doctrine is wholly inconsistent with the statutes of Nebraska.

In Perkins vs. Gridley, 50 Cal. 97, it was held that if a will gives the executors a naked power, not coupled with an interest, to sell the estate without any special directions, the sale must be reported to and confirmed by the Court.

"The executors must give notice of the sale, return accounts thereof, and unless there are special directions in the will, must conduct the sale in all respects as if made under an order of Court. The sale must be reported under oath, and confirmed by the Probate Court before the title to the property sold can pass."

In the estate of Durham, 49 Cal. 490, the same ruling was made, and the Court in its opinion, used almost verbatim the language above quoted from 50 Cal. 97.

In estate of Delaney, 49 Cal. 76, it was ruled that an approval of an executor's accounts was not an approval of the sale, or a confirmation thereof. This case also notes the clear distinction between a case where the will creates an interest or trust estate in the executors, and a case where the will simply gives the executors a right to sell the real estate as in the case at bar. In the last named class of cases the statute must be complied with,

touching the manner and confirmation of sale, and the Court so held.

In Hunt vs. Hunt, 11 Nevada, 442, the Court sustained a sale made under the provisions of a will, but did so upon the express ruling that the devisee took the property devised as an absolute owner, and not upon trust.

The language of the will was: "Having the fullest confidence in her capacity, judgment, discretion and affection, to properly bring up, educate and provide for our children, and to manage and dispose of my said property, in the best manner for their interests and her own."

The title of Woolworth is not one arising out of a decree rendered in the case of Morton vs. Root. If Morton did not have title at the time of the decree, the decree did not vest him with title. Woolworth is not claiming title under assignment of that decree. Allen Root claims title under adverse possession for a sufficient period of time under the statutes of Nebraska to create in him a title adverse to that of Woolworth. If the Court entertains jurisdiction of this case it requires a decision as to whether the deed from Oliver P. Morton to Woolworth conveyed any title, and decision upon the effect of the deed from the executors to Woolworth, and decision upon the claim of title made by Allen Root, under adverse possession. In a word the Court will be required to decide the effect of the deed from Morton to Woolworth; the effect of the deed from the executors to Woolworth; the adverse possession of Allen Root, which has arisen since the decree was rendered in Morton vs. Root, and which question was not considered in that case. The relief now sought does not go to the overturning of the decree in

the suit of Morton vs. Root, nor does it in any way involve its construction or modification. It does not appear from anything in this record that Allen Root is claiming any rights under that decree, nor that he is claiming any rights adverse to it. From all that appears he may admit the full force and effect of that decree. We may say in the present case, as was said by the U. S. Supreme Court, in case of Minnesota Co. vs. St. Paul Co., 6 Wall, 745. "The present bill is filled with matters of complaint which have occurred since the original decree, * * * and which have no necessary connection with that decree."

When O. P. Morton commenced his action in the Territorial District Court of Douglas County, Nebraska, against Heman Glass and Roswell G. Pierce, to quiet the title to the premises in controversy, and set aside and declare null and void the Sheriff's deed for the premises in controversy, executed to Heman Glass, he had not received any deed for the premises in controversy, or any part thereof, from the Sheriff of Douglas County, in said Territory, and he had no interest whatever in the premises in controversy, except a judgment lien thereon in the attachment suit commenced by him against Pierce, in case that judgment was a valid one, but if that was invalid, then, at the commencement of said action, he had no interest in the premises in controversy; hence the said Territroial District Court had no jurisdiction to render a decree in favor of O. P. Morton against Pierce and Glass, quieting the title to said premises; but if that Court had jurisdiction, said decree was inoperative and void as to Allen Root, and also as to Heman Glass and Roswell G. Pierce, because prior to the rendition of that decree, all

the title or interest which Glass ever had or acquired to the premises in controversy, had been conveyed by Glass by deed to Allen Root, and Allen Root was not made a party to that proceeding. Therefore that decree did not affect any of the rights of Allen Root in and to the premises in controversy. But it will be seen by this Court, from an examination of the evidence in this cause, that the lands now in controversy were not described in the bill of complaint in that action in the Territorial District Court, to quiet the title to said premises, against Pierce and Glass, nor were they described in the decree by which it is pretended and alleged that said title was quieted. Hence that decree was also inoperative and void, because said premises were not described either in the bill or in the decree. From an examination of the evidence taken in this cause, and particularly that of Frank E. Moores, Clerk of the District Court of Douglas County, Nebraska, it will be seen that, if there ever was any writ of attachment issued in favor of Oliver P. Morton, against Roswell G. Pierce, out of the Territorial District Court of Douglas County, Nebraska, or any action in attachment against Pierce, in favor of Morton, that some person or persons had caused to disappear from the office of said District Clerk, all of the files in that action, as well as all of the original papers therein, including the alleged writ of attachment, and that there was nothing to show that there ever had been a writ of attachment in that action against the premises in controversy, or any part thereof, or that such writ was ever levied upon the premises in controversy. That the only thing that can or could be found in the office of the District Clerk, indicating that there had been an attachment issued in that action, was an entry

upon the appearance docket made by the then Clerk, that a writ of attachment had been issued. Now it may be well to inquire who had such an interest in the matters in controversy in this action, as to have caused to disappear all the files and original papers from the office of District Clerk, if any such ever existed in that action, and who would be likely to have prevented any complete record from being made, showing the facts in that action? Is there any other person than the complainant in the present bill, who would have any motive to induce him to cause such proceedings to be removed from said Clerk's office? These are questions which it would be well for this Court to determine from the evidence adduced in this cause, and the legal and proper inferences to be drawn therefrom.

The absence of these files, and all proceedings taken in the alleged attachment action, and the absence of the alleged writ of attachment, and of any record thereof, and of any Sheriff's return of a levy thereof by him made upon the premises in controversy, are significant circumstances which should be considered by the Court, in passing upon the question as to whether O. P. Morton ever had any title to the premises in controversy, and it is well to state that such absence rendered it impossible for the said Root to show, in the proceedings taken before Judge Dillon, to quiet the title of the premises in the name of Oliver P. Morton, against Allen Root, that O. P. Morton never had, originally, acquired any title to the premises.

By an examination of the testimony of Mr. Woolworh it will clearly appear that at no time during the progress of the action in which the decree was rendered by his

Honor, Judge Dillon, prior to the commencement of said action, did Allen Root have any knowledge or intimation whatever that the premises in controversy had been conveyed by Oliver P. Morton to his brother William S. T. Morton, before the commencement of that action. In no way or manner had it been brought to his notice, or had it come to his knowledge, that such conveyance had been made, or that such deed had been recorded. From an examination of the testimony of his counsel in that action, Hon. B. E. B. Kennedy, it will clearly appear that he had no knowledge whatever that such a conveyance had been made by Oliver P. Morton, the complainant in that proceeding, to his brother, William S. T. Morton, of the premises in controversy, prior to the commencement of that action, so that, as neither Allen Root, nor his then counsel, had any knowledge, nor even a suspicion, that Oliver P. Morton had conveyed all his right, title, claim or interest in the premises in controversy before he commenced said action, it was impossible for them, or either of them, to bring that fact to the notice of his Honor, Judge Dillon. Hence it cannot be said that this matter might have been litigated, tried and determined in the action in which said decree was rendered by his Honor, Judge Dillon, in favor of Oliver P. Morton, and against Allen Root, as that fact was studiously concealed both from the Court, and from the counsel for the defendant, as well as the defendant himself, by the complainant in the present bill, who had received said deed either from Oliver P. Morton or William S. T. Morton, and placed the same of record in the office of the Register of Douglas County, Nebraska, as shown by the evidence; it is clear, therefore, that it could not have been brought to the no-

tice of the Court, by Allen Root or his counsel, as Mr. Woolworth in his testimony in this proceeding seems to intimate that it was their duty to do in that action; hence it was no fault either of the defendant or his then counsel, that the concealment of the fact from the Court by James M. Woolworth was not brought to the knowledge of the Court.

It is contended by appellee that he acquired the title to the undivided one-half of the premises in controversy in this action by virtue of a quit-claim deed made to him by Oliver P. Morton on or about the 24th day of June, 1873, for the consideration of $50.00, and he alleges that this deed was made to him by Oliver P. Morton at the request of William S. T. Morton, but there is no evidence that the said deed was made by the said Oliver P. Morton at the request of William S. T. Morton.

Now, if it be a fact that on the 19th day of August, 1869, as is shown by the record, and shown by the testimony in this cause, that Oliver P. Morton conveyed to William S. T. Morton all the right, title and interest in the premises in controversy, which he had acquired by virtue of his Sheriff's deed therefor, then he had no interest whatever in the premises in controversy to convey to James M. Woolworth, and the deed which he made in June, 1873, to James M. Woolworth conveyed nothing whatever. But it is contended by Mr. Woolworth that Oliver P. Morton originally acquired title to the premises in controversy by virtue of an attachment thereof made in the name of Oliver P. Morton against Roswell G. Pierce, the prior owner of the premises in controversy, and a sale under and by virtue of said pretended attachment and Sheriff's deed issued thereupon.

Now, the testimony of the Clerk of the District Court of Douglas County, Frank E. Moores, taken in this action shows that neither the files nor the alleged pretended original writ of attachment, nor any complete record of the proceedings in that alleged attachment, nor anything whatever can be found in his office, showing that there was any attachment of the premises in controversy, or any sale of the premises in controversy, or any return of the the Sheriff of Douglas County, Nebraska, that the premises in controversy had been attached, at the suit of Oliver P. Morton, nor is there anything whatever to show that the premises in controversy were attached at the suit of Oliver P. Morton, except an entry upon the appearance docket, which states that there was an attachment issued in that action.

Now, it appears to be clear from this testimony, that there was no foundation whatever for the deed made by the Sheriff of Douglas County to Oliver P. Morton, for the land in controversy. That such deed cannot be supported, and is not supported by the testimony which has been taken in this action on behalf of the complainant, James M. Woolworth, nor has such deed been supported by any testimony which was taken in the action to quiet title in the Circuit Court begun in the name of Oliver P. Morton, on the 27th day of August, 1870, by James M. Woolworth, who was his solicitor, except the entry upon the appearance docket in the alleged pretended attachment and action in the District Court of Douglas County Nebraska.

That being the case it cannot be said with any degree of truth that Oliver P. Morton acquired any title whatever, or any interest whatever in the premises in contro-

versy by virtue of said Sheriff's deed, made and issued under said pretended attachment of the lands in controversy, but in case he did acquire any interest by virtue of said Sheriff's deed, he had conveyed it to his brother, William S. T. Morton, long before the commencement of his said action in the Circuit Court, presided over by his Honor, Judge Dillon, and hence he had no such interest in the premises in controversy as could be made the basis of the action so brought by him to quiet the title of the premises in controversy, in him as against Allen Root.

Now, if he had conveyed to his brother, William S. T. Morton, by a deed which is good between the parties, all his interest in the said premises before the obtaining of the decree in the Circuit Court, rendered by his Honor, Judge Dillon, he had no more interest in the premises in controversy, after the rendition of that decree, than he had at the commencement of that action. Hence the quit-claim deed made by him to James M. Woolworth conveyed nothing whatever to Mr. Woolworth.

Now, it is not pretended by Mr. Woolworth that he acquired any interest from the executors of the will and estate of William S. T. Morton, other than an undivided one-half of the premises in controversy. If William S. T. Morton had acquired from his brother, Oliver P. Morton, the title to all of the premises in controversy, then there still resides in Wm. S. T. Morton's executors, or in his heirs, the title to the other undivided one-half of said premises, and if the title to the other undivided one-half of the premises remains in the executors of said William S. T. Morton's estate, or in his heirs at law, then Mr. Woolworth cannot by virtue of his bill filed in this case, which is in the nature of an ejectment bill, brought in a

court of equity, oust from the possession of these premises the defendant, Allen Root.

Why? Because Allen Root has held possession in that view of the case, of the undivided one-half of these premises as against all the world for more than 16 years, and in any event, James M. Woolworth would be nothing more than a tenant in common with Allen Root in the land, Allen Root having by virtue of his possession of the land for 16 years acquired a good and perfect title thereto as against the heirs of William S. T. Morton, and as against all the world besides.

But it is clear that the deed made by the executors and executrix of the last will and testament of W. S. T. Morton to Woolworth, conveyed no interest to him in the premises in controversy, because neither the statutes of Nebraska, nor those of Indiana, were complied with by them in making such conveyance. That they had no power to convey the premises thereby, in consequence thereof.

Now, there never has been any actual possession of any part of this land whatever shown by the testimony in this case, to have been had or held by James M. Woolworth, or by Oliver P. Morton, or by William S. T. Morton, and neither of them ever have been in actual possession of the land, and no acts of ownership have been exercised over the land whatever, by either Oliver P. Morton, William S. T. Morton, or by James M. Woolworth, except the cutting off of the timber upon the land in 1883, by and under the direction of Mr. Ames for Mr. Woolworth, from which the testimony shows very clearly that Mr. Woolworth derived no revenue whatever, but that the timber was given to one August Doll for cutting same off

of the land; then they cannot be said to have acquired any rights in the land by virtue of any possession *thereof*.

The decree rendered by Judge Dillon is a nullity by reason of the Court having had no jurisdiction whatever to render the same, in consequence of Oliver P. Morton's having had no interest whatever in the land—such as would support an action to quiet title—and it being a nullity by reason thereof, it can be successfully attacked collatterally, and it can be attacked in the same Court in which it was rendered, by showing the facts as to the want of interest, or title, or right in the land in Oliver P. Morton, at the time of the commencement of his action to quiet the said title. That it has been successfully shown, and that all the testimony taken in respect thereof is competent, there is no kind of doubt. If that decree was a nullity, then Oliver P. Morton acquired nothing thereby, and if Oliver P. Morton acquired nothing thereby, then James M. Woolworth, who pretends to claim under him, has no interest whatever in that part of the land which it is alleged and contended by Mr. Woolworth was conveyed to him by Oliver P. Morton, after the rendition of that decree; hence as to that undivided half that was quit-claimed to James M. Woolworth by Oliver P. Morton, after the rendition of that decree, James M. Woolworth has acquired no title, and cannot succeed in his attempt to oust Allen Root from the possession thereof, by filing what he calls a supplemental bill, endeavoring to carry into effect the decree which has been shown to be a nullity.

SUPPLEMENTAL BILL.

Mr. Woolworth is entitled to a patent for having devised a new and useful method of giving the Federal

Court jurisdiction. His invention consists in calling an original bill—a supplemental bill to carry a former decree into effect—although his bill shows, on its face, that the former decree had been completely executed. We contend that even a good title acquired *after* the filing of an original bill, cannot be brought into a case by a supplemental bill, to take the place of the bad title stated in the original bill. Emmerson vs. Hubbard, 34 Fed. Rep. 327.

Appellant asks that the decree of the Circuit Court may be reversed.

Respectfully submitted,

GEORGE W. COVELL, and
UPTON M. YOUNG,
Counsel for Appellant, Allen Root.

Supreme Court of the United States

OCTOBER TERM, 1882.

TERM No. 77.

ALLEN ROOT,

Appellant,

against

JAMES M. WOOLWORTH,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

BRIEF

Of Counsel for Appellee, to show that the Judgment Appealed from should be Affirmed.

BURTON N. HARRISON,
J. M. WOOLWORTH,
Of Counsel for Appellee.

C. H. REINHART, Printer and Green Street, New York.

Supreme Court of the United States,

OCTOBER TERM, 1893.

TERM NO. 77.

ALLEN ROOT,
Appellant,

vs.

JAMES M. WOOLWORTH,
Appellee.

BRIEF FOR APPELLEE.

This is an appeal from a decree of the Circuit Court of the United States for the District of Nebraska.

The suit was by supplemental bill filed by the appellee against the appellant.

The facts were these:

On the 27th of June, 1865, Oliver P. Morton commenced against Roswell G. Pierce an action in attachment, in the District Court of the Territory of Nebraska for Douglass County, for the recovery of a large sum of money, and took out the writ which was levied upon the premises in question (Printed Record, pp. 264–267). Notice to Pierce of the pendency of the action was published in the newspaper. Judgment was entered in Morton's favor against Pierce, with an order for the sale of the premises. An order of sale was issued, upon which the premises were sold to Morton. This sale was confirmed by the Court, and the Sheriff accordingly made his deed, dated April 15, 1869, which was recorded in the County Registry.

On the 18th of January, 1860, Heman Glass had sued said Roswell G. Pierce in attachment in the same court, and had caused certain lands to be attached, none of which were those taken by Morton, as hereinbefore stated. Notice to Pierce of the pendency of the action was published in the newspaper; there was no personal service upon him of any form of process; summons was issued, but the Sheriff returned to it that the defendant was not found; Pierce did not appear to the action; all the proceedings were *ex parte*. Glass took judgment for the amount claimed by him, and annexed thereto was an order for the sale of the attached property. Upon such sale the amount of the judgment was not made, and on the 14th of July, 1861, Glass sued out a general execution upon his judgment, which was levied upon the premises in question here, and, upon sale thereof by the Sheriff, Glass was the purchaser. The sale was confirmed, and the Sheriff made his deed to Glass. These facts appear from the copies of papers constituting the record in the case of Glass vs. Pierce, which are found at pages 107–121 of the printed record in this case.

On the 6th of January, 1866, said Oliver P. Morton filed his bill in the same Court against Pierce and Glass, alleging (pp. 272–277) the facts above stated, and prayed that by the decree of the Court the proceedings under which Glass claimed be declared void, and for other ancillary relief. To this bill Glass filed a general answer. Other lands were involved besides those here in question. On the 3rd of November, 1866, a decree was rendered (pp. 283, 284) finding the equities in favor of Glass as to all the lands there involved except those to which the present suit relates—as to which latter it was decreed: That Morton's judgment against Pierce attached to those premises (the lands involved in the present suit); that no right, title or interest in them was seized, taken or affected by the proceedings at law by Glass vs. Pierce; and that Morton's lien was unaffected thereby. On the 2d of July, 1866 (p. 105), after the bill was filed by Morton against Glass, but before the decree, a deed (p. 104) was entered in the County Registry from Glass to Root, conveying the premises This put Morton to another suit, to get a decree which should reach Root. When this became known, and on the 27th of August, 1870, Morton filed another bill in the Circuit Court of the United States for the District of Nebraska, impleading Root (pp. 248–251), in which the same matters already set forth in the bill against Pierce and Glass were again alleged, together with a statement of the pro-

ceedings in the equity suit against Pierce and Glass, and the deed to Root, *and that Root was not in possession* (p. 251). The prayer was that it be adjudged that the judgment recovered by Glass against Pierce was not a lien upon the premises; that the sale under execution issued on said judgment, and the Sheriff's deed to Glass, and Glass' deed to Root, were void and of no effect; and that Root be decreed to release the premises to Morton, the plaintiff.

On the 24th of February, 1872 (p. 257), Root filed his general answer (pp. 252–257) to Morton's second bill. In his answer he recited (pp. 252–255) that he believed it to be true that the several successive steps in the proceedings under which the title to the premises in question came to Morton were as stated in the bill.

The answer by Root in that suit further insisted that the description of the premises in all of Morton's proceedings was defective (p. 255). For the purpose of defeating the equitable jurisdiction, it was further alleged in Root's answer in that suit (p. 256) "that, "for and during two years last past, he, this defendant (Root), had "been and was at the commencement of this suit, and now is in the "actual possession, use and occupation of the lands in question, "claiming title thereto, under and by virtue of a certain deed thereof "from one Heman Glass and his wife to this defendant (Root), "dated and made on or about the 10th day of December, 1864, and "recorded as alleged in the bill." On the 8th of May following, that cause was heard upon pleadings and proofs by Judge DILLON, at the time Circuit Judge, who rendered an opinion (see record, pp. 269, 270) in which he stated succinctly the allegations of the bill, and examined the question of possession—upon which he used the following language (p. 269):

"The first question to be settled is the jurisdiction of the Court. "This is conceded, in the arguments, to depend upon the fact "whether the defendant was, at the time the suit was commenced, "in actual possession. If in possession, no reason is stated in the "bill why the respective rights of the parties could not be deter-"mined in ejectment. The bill in this case was filed August 27, "1870. We find, upon a careful reading of the evidence, that no "fences or permanent improvements of any kind have ever been "made upon the premises. The acre and a half of potatoes were "raised in 1871, and the weight of the evidence shows that the "clearing off of the small quantity of land was in the fall of 1870, "which would be after [this] suit commenced. Upon the proofs in "this cause the plaintiff could not have established possession in

" the defendant at the time this suit was brought, and the Court " has jurisdiction to determine the respective rights of the parties."

He then examined the question of title, and found that the proceedings in the case of Glass vs. Pierce were void for want of jurisdiction, on which subject he says (p. 269) :

" Both parties claim title under judicial sales against Pierce. " The sale under which the defendant derives his right was void for " the want of a valid judgment and execution. Jurisdiction over the " person or property is absolutely essential to a valid judgment, and " as the property here in question was not attached, and as the judg- " ment against Pierce was rendered upon constructive service by " publication, there was no authority whatever to levy upon and " sell this land. This point is clear and has not been contested by " the defendant's counsel in argument, but he has relied upon the " insufficiency or weakness of the plaintiff's title. We proceed " briefly to notice his objections to this title."

He then discusses the objection made to the plaintiff's title, upon which he says (see record, p. 270) :

" Although a portion of the papers in that action have been lost, " yet the entries on the appearance docket, the order of sale, the " return endorsed thereon, the appraisement, the notice of sale, the " execution, the Sheriff's deed to the plaintiff, all of which are pro- " duced, show that this objection is without foundation in fact. It " is also objected that the plaintiff's deed from the Sheriff is void, " because it and the precedent proceedings which it follows does " not describe the land with sufficient certainty. The description is " as follows : ' Beginning at the northwest corner of section 28 ; " ' thence south 8 chains and 5 links ; thence south, 85 degrees, 20 " ' chains and 10 links ; thence north 9 chains and 70 links, west 20 " ' chains, to the place of beginning, in township 15, range " ' 13 east of the sixth principal meridan.' The only de- " fect pointed out is the omission of the word " *east* in the second call in the description ; but, as the testimony of " the two surveyors examined as witnesses satisfactorily shows, this " omission is easily supplied by the data afforded by the description " as a whole. The only uncertainty is whether the second course is " 85 east or west. As the last course is ' west to the place of " ' beginning,' it is obvious that the course on the corresponding " line on the south must be east. The testimony of Surveyor Wiltse " puts this in a clear light. He says : ' The description is defective " ' in this, that in the second course from the place of beginning the

" ' letter " E " is omitted, running east. To determine whether it is
" ' east or west I return to the place of beginning and reverse the
" ' courses and distances until I arrive at the corner upon which
" ' this defective course must close, and I find that, to close
" ' the survey or retrace the boundary, this course must be south
" ' 85 degrees *east*, 20 chains and 10 links.' And to the same effect
" is the evidence of George Smith, the only other surveyor exam-
" ined, to the point. The description is just as certain as if the
" word *east* had been inserted. The result is that the plaintiff is
" clearly the owner of the land in question and is entitled to the
" relief prayed, which is to remove the cloud upon his title, and not
" for possession. Decree accordingly."

The decree followed the opinion (p. 271). It decreed that the judgment of Glass against Pierce was never a lien upon the premises; that the sale of the premises, upon execution of said judgment, and the Sheriff's deed to Glass, and, also, Glass' deed to Root, were utterly void and of no effect. It further decreed that Root make a conveyance of the premises to Morton, and that, in case of his failing to do so within a time therein limited, Watson B. Smith, who was appointed a Master in that behalf, make such conveyance in his place; and that the conveyance so to be made by the Master be as effectual as if made by Root himself.

On the 24th of June, 1873 (p. 246), Oliver P. Morton and his wife conveyed an undivided half of the premises to Woolworth. On the same day Oliver P. Morton and wife conveyed the other undivided half to his brother, William S. T. Morton (see the allegation of this fact made in defendant's answer in this suit, Printed Record, p. 16; and see the offer of that deed in evidence, p. 292, though appellant has not furnished a copy in the transcript of the record on this appeal; and see the deed itself on printed pages 14 and 15 of the exhibits supplied by appellee under a stipulation of the parties to complete the transcript of the record, which exhibits are, upon motion and by order of this Court, allowed to be taken as and made a part of the record here). On the 4th of June, 1879 (p. 245), the executors of W. S. T. Morton [in the exercise of the power of which they were by his will made donees] conveyed to Woolworth the undivided one-half of the premises that had been of their testator; and, on the 13th of June, 1889 (pp. 247, 248), they executed and delivered another and confirmatory deed to Woolworth, making the same conveyance, with fuller recitals of proceedings—which was after the

will had been admitted to probate in Douglas County, Nebraska, and after letters testamentary had there issued on that probate.

Woolworth has paid all the taxes, city, county and State, general and special, as they fell due, from 1873 to the present time (pp. 178–186, 224–244).

A large part of the land was wooded. In 1883 and '84 Woolworth caused all the wood to be cut (pp. 172, 201, 207) and, under the statute, laid the land out into streets, blocks and lots, as an addition to the City of Omaha under the name of "Oakhurst" (pp. 286, 207, 192)—advertised the lots for sale and sold (p. 207) many of them. The formal proceedings under the statute, by which "Oakhurst" was laid out by Woolworth, and accepted by the local authorities of the city as an addition to Omaha, were in evidence in the Court below (p. 293); they were not furnished by the appellant as a part of the transcript he filed here, but have been now supplied by the appellee, under stipulation of the parties, to complete that transcript, and are, upon motion and by order of this Court, allowed to be taken as and made a part of the record here (see printed pages 17–21 of the exhibits so supplied). On the city maps the lands were marked as belonging to Woolworth and Morton, until the latter's deed to the former, and, after that, as belonging to Woolworth (pp. 292, 291). During all this time, Root lived in or near Omaha, and frequently saw the land and was upon it; but he never set up any claim to it (pp. 48, 191, 192, 197). He now asserts that, during all the time since 1865, he has been in possession of the land: *First*, by what he pretends to have done before the decree in Morton's second equity suit (the one to which this defendant was a party)—being the same acts Judge DILLON comments on in his opinion; *second*, by cutting some of the wood—which many others, he says, also did; *third*, by sometimes camping on the land over night; *fourth*, by having tenants on the land. This last pretension turns out to be as absurd as the others. It will be examined more particularly hereafter; if what he says in that regard is true, the most he makes out is that people lived on the land "by his permission."

About a month before the bill in this suit was filed, Root assumed to take possession of the premises, built a fence around them and a house thereon, and removed into that house with his family (pp. 42, 191, 197); and he was giving it out to the public that he would lease parts of the premises to whoever would build a house there and occupy it (p. 4), his object being to multiply actions

by Woolworth to recover possession and establish his rights; and the bill expressly charges (Record, p. 4) that "in entering "upon said premises and claiming the same, the said defendant, as "your orator believes, claims no rights except such as were de- "rived by him from the said Glass," and that, "in order to carry "the decree of this Court, made on the 8th of May, 1873, into exe- "cution and give to your orator the full benefit thereof, it is neces- "sary that it shall be supplemented by an order of injunction "hereinbefore prayed, and, unless such injunction be allowed to "your orator, such decree will be ineffectual and your orator will "be subjected to a multiplicity of suits in order to recover posses- "sion of the said premises from the parties to whom said plaintiff "will lease the same."

The prayer is (pp. 5, 6) that Root be enjoined from asserting any right, title or interest in the premises, and from occupying the same or any part thereof, or leasing, or pretending to lease, or admitting any party, under any pretense, into the premises, and from making any contract, lease or deed affecting them or the possession thereof, or the title thereto, and from excluding the plaintiff therefrom or preventing him from taking sole and exclusive possession of the same, and from bringing any action or actions touching the title or possession of the premises, and that it be by the decree of the Court declared that the defendant has not and never had any interest whatever in the lands as in and by the two several decrees thereinbefore mentioned has already been declared and adjudged, and that a writ of possession issue out of the Court to the marshal commanding him to remove the defendant and his tenants and agents therefrom, and that the injunction be made perpetual, and for general relief.

Root filed his general answer (p. 10–20) to this bill, alleging, so far as the contents thereof need here be stated, Morton's second bill, answer thereto and the proceedings thereon—setting forth at length the decree of Judge DILLON; to the validity of the two decrees in favor of Morton, one against Glass and the other against Root, the same objections are repeated which were alleged by Root in his answer to Morton's second bill, and which were examined and held to be unsound in Judge DILLON'S opinion and decree thereon, namely: *first*, that the premises were described so defectively in the proceedings upon which the Morton title rested as to render the same entirely ineffectual; and *second*, that, from a time before the filing of Morton's second bill to the decree, Root was in the adverse

possession. Possession is further claimed in the answer from 1869 (which was before Morton's bill, secondly above mentioned, was filed) to the present time, by reason of which defendant charges that the plaintiff's right of action to recover the premises has been barred by the Statute of Limitations. The deed by which Oliver P. Morton's title to an undivided one-half of the premises came to Woolworth is admitted (p. 15); the deed by which Oliver P. Morton and wife conveyed, June 24, 1873, the other undivided half to William S. T. Morton is expressly alleged; all knowledge of the deed by which that other undivided one-half came to Woolworth is denied; and the answer insists that Woolworth has no title.

The answer contains also this denial and allegation (p. 18): "Defendant denies that, in entering upon the said premises and "claiming the same, he claims no rights except such as are derived "by him from said Glass; but alleges that he claims the said prem-"ises as his own, and has so claimed the same continuously for "more than 19 years past."

The cause was heard, upon pleadings and proofs, by Mr. Justice BREWER while he was Circuit Judge, who wrote a well considered opinion (pp. 305-307), and a decree was by him rendered in favor of the plaintiff (pp. 308, 309). In that decree it was found and adjudged that the plaintiff has, by divers conveyances, succeeded to the title of Oliver P. Morton, and was and is entitled to the benefit of the decree of the 8th of May, 1873, and to have the same carried into execution; that the defendant has not and never had any interest in the premises; that defendant's possession thereof as alleged in the answer is, and since said decree of May 8, 1873, has been, subject to the title in and by the said decree adjudged to and quieted in Morton; and that the defendant's possession is against and in violation of that decree. It further decrees (p. 308) that the injunction prayed for in the bill issue and be made perpetual, and that a writ of possession issue to deliver possession to the plaintiff.

And from that decree (entered December 26, 1889) defendant was allowed and has brought his appeal to this Court (pp. 309, 310).

POINT I.

Before coming to the question whether this is a supplemental bill within the meaning of that term in the Federal jurisprudence, it will be useful to ascertain what Morton's remedy would be had he not conveyed the property.

The case may be shortly stated thus: Two parties, Morton and Root, claimed the estate adversely. Neither being in actual possession, Morton filed his bill against Root to have his own claim established, Root's claim declared void, and Root decreed to convey to him. After a hearing on pleadings and proofs, Morton had a decree finding that Root was not in possession, establishing Morton's claim against those of Root, and ordering Root to convey to Morton —which in effect was done. Afterwards, many years afterwards, Root assumes to disregard the Court and to set the decree at nought, re-asserts the same claim which antedates the decree against him in Morton's favor, and which had been determined against him by that decree. This statement leaves out several elements of the case, *e. g.*: the enquiry who had possession all this time, and if Root had, what is the effect of that, upon the rights of the parties; what are the attitude and rights of Woolworth as Morton's grantee, and some other questions. They will all receive attention hereafter. The preliminary and simple view of the case as between Morton and Root, occupies us now.

Having a decree settling the title in him, with an order for a deed from Root to him, Morton was, as against Root lately going into possession, entitled—upon a summary application to the same Court, and in the same suit, at the foot of that same decree—to the assistance of the Court in removing Root from that lately asserted possession; Morton would not be driven to a new suit to recover possession. The practice in such cases was settled at an early day, not only in foreclosure cases and where sales were decreed, but in cases in which the decree was for a deed—and also in cases where the decree did not, as well as in those where it did, require the defendant to surrender the possession.

Dove vs. Dove was before the Lords Commissioners in 1783, and, as was said by Chancellor KENT in 1820, settled the question as to the authority and practice in a court of equity. There is a memo-

randum of it in 1 Brown's Ch. R., at page 375; but the report made by John Dickens himself, the then Register of the Court of Chancery, and an authority as to practice in that court, is so much in point in the case now at bar that we may be indulged in quoting it at length. The learned Register does not cite the earliest of the cases, but musters such an array of authority, in what was still an unusual proceeding, as convinced the Court against the contention of counsel. That report is as follows:

"By the decree, the estate of the testator was to be sold, and *all* "*parties* were to join: The defendant, the widow, who had got into "possession, under some claim of jointure or dower, and the receipt "of the rents and profits, was directed to account: The estate was "sold, and the purchaser served the defendant, the widow, (in "whom there was no legal estate from her husband), with a writ of "execution of the decree, and applied to her to join in the convey- "ance, and to *deliver* possession; which she refusing or neglecting "to do, he issued an attachment against her, and she was arrested "upon it; and on the 15th of *November* he moved of course, and "obtained an order for a writ of assistance; but there not having "been the previous order to enjoin her to deliver possession, I ob- "jected to draw it up; upon which the plaintiff acquainted the "Court with my objection; the Court allowed my objection, and on "the 20th of *November*, the plaintiff changed his motion, and "moved for, and obtained an order for an injunction, to enjoin "the defendant to deliver possession; but there not hav- "ing been any previous and direct order for the defendant to deliver "possession, only the words of the decree, for all parties to join, "which the plaintiff said implied it; but which, as it appeared to "me, was only to give the purchaser a title, I again objected, and "they again acquainted the Court with my refusal to draw up the "order; and the Court requiring my reasons, I submitted to Lord "*Loughborough* the following observations:

"There are certain writs or processes of contempt, that issue out "of Chancery, to obtain which, particular and established rules are "to be observed; there are some that are made out of course, by "the Clerk in Court, and pass the Great Seal, without an order, to "wit, attachments, attachments with proclamation, commission of "rebellion; others there are, amongst which, is a writ of assistance, "that do not issue without an order.

"To ground an attachment against a party, service and dis- "obedience of something under the Great Seal, (subpœna or order)

" must be proved ; which being proved by affidavit, an attachment " issues. Lord *Bacon's* 77th order.

" There are instances in which attachments are not to be executed : " One against an infant for not appearing to a bill filed against him, " which is issued merely to ground an order, for a messenger to " bring an infant into Court, to have a guardian assigned him. *Per-* " *kins vs. Hammond*, 5 *June*, 1746, by Lord *Hardwicke :* the other " is, the attachment that is issued, for not obeying a writ of execu- " tion of an order, to deliver possession of land, which is issued " merely for the purpose of obtaining an order, for an injunction to " enjoin the party to deliver possession ; see *May vs. Hook*, *June*, " 1773, by Lord *Bathhurst*, C. the plaintiff had unadvisedly ex- " ecuted the attachment and had the defendant in prison ; his Lord- " ship ordered the defendant to be discharged with costs, after hear- " ing counsel on both sides, and upon consideration : The defendant " afterwards would have brought an action for false imprisonment ; " but this his Lordship restrained him from doing, upon the ground " that this Court will punish its own officers, agreeably to a case in I. " *Vern.* 269 ; where it is said, ' the irregularity of serving the process " ' of the Court is only punishable here ; and, therefore, an injunc- " ' tion lies, to stay proceedings at law, for irregularity.'

" A writ of assistance must be applied for, because the Court is " to be satisfied that the steps requisite to be pursued have been " followed ; they are these, first, the service of a writ of execution, " of an order to deliver a demand, and the issuing an attachment for " disobeying it.

" The next is an injunction to enjoin the defendant to deliver " possession, (which affects the tenant), and which the order for the " defendant to deliver possession, doth not, as is said in *Venables vs.* " *Foyles*, 12 *Car.* 2 Lib. fol. 260.

" The order for the injunction is of course, upon affidavit of ser- " vice of a writ of execution of the order for the defendant to " deliver possession, demanding possession, refusal, and the issuing " the attachment.

" Upon proof of service of the injunction, and its not having " been complied with, upon motion without notice, and reading an " affidavit of the facts, a writ of assistance will be ordered.

" The first I have hitherto been able to meet with, is *Russell vs.* " *Boderille*, 12 *Car.* 2. Lib. B. fol. 38 an order for a writ of assistance " grounded on an injunction to deliver possession : not obeyed.

" *Underhill vs. Whichcote*, the same year, and book, fol. 460.

" *Venables vs. Foyles*, the same year, and book, fol. 670. A simi-
" lar order upon the same grounds. Note: In this a question arose
" respecting the regularity of the proceedings, which was referred to
" the two senior six clerks, not toward the cause, (at that time the
" custom), who certified the same to be regular.

" *Darlow* v. *Bradgate*, 18th *July*, 11 *William* 3d. the like.

" *Milward* v. *Milward*, 14th *July*, 8th of Queen *Ann*: motion for
" an injunction; 20th of same month, order for a writ of asssist-
" ance.

" *Noble* v. *Wilson*, 12th *February* 9 *Geo.* I. order for an injunc-
' tion: 20th of same month, order for a writ assistance.

" *Done* v. *Holt*, 10th *December*, 2d. Geo. 2. a writ of assistance de-
" nied, because an injunction had not issued, to deliver possession,
" which was then ordered; and on the 14th of *January* following, a
" writ of assistance was ordered.

" *Stribley* v. *Hawkins*, by Lord *Hardwicke*, 28th *November*, 1744
" and in 3 *Atkins*, 275. His Lordship said, 'a writ of injunction
" ' must first issue, and be served, before you can have a writ of
" ' assistance.'

" The following is the form of an order for an injunction to de-
" liver possession:

" ' Upon motion, etc. it was alleged, that by the decree or order,
" ' dated it was ordered, that the defendant should deliver
" ' possession of the land, &c., to the plaintiff; that the defendant
" ' who is in possession of the said land, was served with a writ of
" ' execution of the said order, and the plaintiff required him to de-
" ' liver possession, which he refused; and thereupon an attachment
" ' hath issued against him, (doth not say it was executed) and there-
" ' fore it was prayed, that an injunction may be awarded against the
" ' the defendant, to deliver possession of the said land, &c. which
" ' upon hearing an affidavit (of the facts) read, his Lordship held to
" ' to be reasonable, and doth order the same accordingly.' "

" It was before observed, that the attachments that issue for dis-
" obedience of a writ of execution, of an order to deliver possession,
" are not executed; in the case before the Court, it hath been exe-
" cuted, (which is wrong according to the custom of the Court), and
" the order of Lord *Bathurst* in *May* v. *Hook*; and the more so, as
" it is for disobeying a writ of execution of a decree in not delivering
" possession, which the decree doth not direct, and they have no
" order.

"On the 22nd of *November*, 1783, Lord *Loughborough* told the "Bar, that he and his Brother Commissioners had considered the ob- "servations laid before them: that they were convinced by them, "and directed me not to draw up the order for an injunction, that "was made on the 20th of the same month; and added, that pre- "viously to the plaintiff's pursuing the regular course, they expected "the plaintiff should release the defendant from her confinement, "under the attachment.

"The plaintiff afterwards pursued the regular steps, and obtained "a *writ of assistance*":

Dove vs. Dove, 2 Dickens Reports of Cases in Chancery, 617.

Upon a decree for a sale, it is usual to insert a direction that the mortgagor deliver up possession to the purchaser; but, whether it be or not part of the decree, a court of equity has competent power to require by injunction, and enforce by process of execution, delivery of possession; and the power is founded upon the simple elementary principle that the power of the Court to apply the remedy is coextensive with its jurisdiction over the subject matter.

"Courts of equity also interfere, and effectuate their own decrees "in many cases by injunctions, in the nature of a judicial writ or "execution for possession of the property in controversy; as, for "example, by injunctions to yield up, deliver, quiet, or continue the "possession, followed up by a writ of assistance. Injunctions of "this sort are older than the time of Lord BACON, since, in his Or- "dinances, they are treated as a well-known process. Indeed, they "have been distinctly traced back to the reign of Elizabeth and "Edward the Sixth, and even of Henry the Eighth. In some re- "spects they bear an analogy to sequestrations; but the latter pro- "cess, at least since the reign of James the First, has been applied, "not merely to the lands in controversy in the cause, but also to "other lands of the party."

Story's Equity Jurisprudence, Section 959.

See, also,

Penn vs. Lord Baltimore, 1 Vesey (Sen.) R., 454.
Stribley vs. Hawkie, 3 Atkyns' R., 275.
Huguenin vs. Baseley, 15 Vesey (Jr.) R., 180.

In *Kershaw vs. Thompson*, 4 Johnson's Chancery R., 609, the original bill was to foreclose a mortgage. The prayer was, that Thompson should pay, or be foreclosed of all equity of redemption,

and surrender up all the title deeds, or that the premises be sold, and for general relief. The decree was that the rights of Thompson and his wife be sold, and that the Master execute a deed to the purchaser. The case came before the Court upon the petition of the purchaser at the sale, to whom the Master had executed his deed. The petitioner showed that he applied to the defendant Elizabeth Thompson, who, the petition alleged, "was and is in possession of the premises," and requested a delivery of the possession to him; that she refused to give possession, unless he pay her $500; that he again applied to her, and showed the deed from the Master, and demanded possession, and gave her notice that he should apply to the Court for an order on her to deliver possession and pay him a reasonable compensation for the use of the premises from the date of the sale. He prayed an order pursuant to the notice so given.

Chancellor KENT delivered an elaborate opinion. He reviewed the English cases and said:

"There could be no doubt, under any of the cases, that "this usual course to obtain delivery of possession, would be "admitted, if it was made part of the decree that the possession "was to be delivered. That omission constitutes all the difficulty "of the case. But the possession, as a consequence, is necessarily "implied in a decree directing the sale of land, and a deed to the "purchaser. The sale would be useless, and without meaning to "the purchaser, if it was not to be accompanied with actual possession. * * * As to the mode of proceeding in the present "case, it is proper to grant an order on Elizabeth Thompson, the "defendant, in possession, to deliver the possession of the premises "to Berry, the purchaser, according to the intent and meaning of "the decree directing a sale. If it had been specially expressed in "the decree itself, on directing that the Master should execute a "deed to the purchaser, *that the defendants who may be in possession, or any person who has come in under them, or either "of them, pendente lite, deliver possession of the mortgaged "premises to such purchaser, on production of the deed*, then "a formal writ of execution of the decretal order to deliver possession would have been proper. But as this effect and intention of "the decree, though necessarily resulting from it, and clearly implied, is left to inference, as it was in the case of *Dove vs. Dove*, "the order to deliver, and a service of it, must supply the place of "the more formal process. The attachment, on the disobedience to "the order, is a useless process, since it is not to be served, and it

" clearly may be dispensed with. The course of proceeding, in this " case, is the order, then the injunction, and then the writ of assist- " ance."

In *Commonwealth vs. Ragsdale*, 2 Henning & Mumford (Va.) R., 52, it appeared, from the report of the Commissioners appointed to sell the mortgaged property, that Benjamin Quarles was in possession of some of the property, which he acquired after the mortgage was duly of record, and that he refused to give it up to the Commissioners, to be sold according to the decree of the Court. The Attorney-General submitted to the Court the course to be taken. " *Per Curiam:* The usual course of the Court has been to make a " rule upon the person in possession where [as in this case] he is " not a party to the suit; and, unless he shows a paramount right " in himself, to order the property to be delivered to the Commis- " sioners acting under the decree; and, if necessary, to enforce " such order by an attachment. Let the rule be returnable to the " next Term."

In *Dorsey vs. Campbell*, 1 Bland's (Maryland) Chancery R., 256, the Chancellor says: " The authority of this Court to cause the " possession of land, sold under its decree, to be delivered to the " purchaser thereof, under certain circumstances, cannot be contro- " verted; and the mode of proceeding in such case has been well " established." In support of that proposition, the Court cites *Dove vs. Dove*, *Stribley vs. Hawkie*, 3 Atkyns R., 275; and *The Commonwealth vs. Ragsdale*, 2 Hen. & Mum. (Va.), R. 8.

In the note to 1 Bland R., 256, several cases in chancery of Maryland are cited to the same effect. One of them is *McKomb vs. Kankey*, where the Chancellor said:

" The general power of the Court of Chancery to issue an injunc- " tion, directing possession to be delivered, is sanctioned by the " practice in England, and by our Acts of Assembly. A decree " for possession and injunction is a process demandable of right, " as much as an attachment or other execution, and ought not " to be refused where the power is considered to exist. An " application for possession in such cases is founded on the " general powers of the Court, and on the Act of 1785" (the provisions of which the Chancellor proceeded to state, showing them to be merely an enactment of the rules of English Chancery as explained in *Dove vs. Dove*). The bill there was for foreclosure of a mortgage; a tenant of the mortgagor, who was not a party and had erected a mill upon the premises, insisted he ought to be allowed

for his improvements, and that, having obtained the lease without notice of the mortgage, he had a right to hold the premises; he, therefore, refused to surrender possession to the purchaser at the sale in foreclosure, who (not a party to the foreclosure suit) applied for an order that possession be delivered and for an injunction; the order was granted, and an injunction issued accordingly against the tenant.

Schenck vs. Conover, 13 New Jersey Equity R., 220, was a bill for foreclosure and a motion for an order on the defendant to deliver possession. The cases are very carefully reviewed, and it was *held* that they show that at this day, upon a sale under a decree of a Court of Chancery, the delivery of possession to the purchaser (whether a party to the original suit or a stranger) by injunction and writ of assistance is well settled and of right when the possessor does not claim to hold by title paramount to the parties. It is there said: "The cases cited meet all the objections that were urged "upon the argument to granting the relief asked for in this case. "They show that the writ of assistance will issue as well when "a special order is made for the delivery of possession "after a sale, as when the direction is included in the de- "cree; that it will be granted at the instance of the *pur-* "*chaser* after a sale, as well as on the application of the "complainant; and that it may be made not only as against the de- "fendant, but against any party in possession under him, or by title "not superior to his. It is scarcely necessary to add that the exer- "cise of the power rests in the sound discretion of the Court. It will "never be exercised in a case of doubt, nor under color of its exer- "cise will a question of legal title be tried or decided. With these "limitations of its exercise, I believe that the practice which has "been adopted will be found both safe and salutary. The practice "of delivering possession of mortgaged premises to the purchaser "under a sale made by the authority of this Court is, as has been "said, of recent adoption in this State. It is not, however, the ex- "ercise of a new power. It is but the more extended application of "a familiar power which has been exercised in the Court of "Chancery for centuries."

Buffum's Case, 13 New Hampshire R., 14, was a bill for specific performance of a contract for the conveyance of lands, and a writ of execution of the decree. The decree required the defendant to execute a deed. A copy of the decree was served upon the defendant August 10th, and a writ of execution of the decree August 14th; on the same day a deed prepared for the purpose was tendered to

him for signature, and he was requested to execute the same, which he refused. Upon proof of the matters alleged, PARKER, C. J., delivering the opinion of the Court, said: "The decree in this case "may be regarded as establishing an equitable title in the plaintiff "George Buffum, so that without the execution of any deed by "Esek Buffum, the defendant, in pursuance of it, the Court would "put the plaintiff in possession by a writ of assistance, if necessary, "and protect his possession by an injunction against any one who "should attempt to disturb it under the defendant's claim of title."

In *Montgomery vs. Tutt*, 11 California R., 190, the decree was for foreclosure of a mortgage. It did not require delivery of possession to the purchaser under the sale in foreclosure. The application to the Court was for a writ of assistance for possession.

FIELD, J. delivered the opinion of the Court, in which it was said:

"The principal question presented by the appeal in this case is "whether the writ of assistance is the appropriate remedy to place "the purchaser of mortgaged premises under a decree of fore-"closure in possession, after he has obtained the Master's or "Sheriff's deed. Of this there can be no doubt as against the de-"fendants in the suit, who are bound by the decree, and who refuse "to surrender possession upon the order of the Court to that effect. "The order, like the one made in this case, takes the place in our "system of procedure of the judicial writ of injunction used in the "old chancery practice in the enforcement of decrees respecting "lands (Eden on Injunc., Waterm.'s Ed., 12). 'Injunctions of this "'sort,' says Story, 'are older than the time of Bacon since in his "'ordinances they are treated as a well-known process. Indeed, "'they have been distinctly traced back to the reign of Elizabeth "'and Edward the Sixth, and even of Henry the Eighth' (Story's "Equity, Sec. 959). The power of the Court to issue the judicial "writ, or to make the order and enforce the same by a writ of "assistance, rests upon the obvious principle that the power "of the Court to afford a remedy must be co-extensive with "its jurisdiction over the subject matter. Where the "Court possesses jurisdiction to make a decree, it possesses the "power to enforce its execution. *It is true that in the present case "the decree does not contain a direction that the possession of the "premises be delivered to the purchaser.* It is usual to insert a clause "to that effect, but it is not essential. It is necessarily implied in "the direction for the sale and execution of a deed. The tile held

" by the mortgagor passes under the decree to the purchaser upon " the consummation of the sale by the Master's or Sheriff's deed. " As against all the parties to the suit, the title is gone; and, as the " right to the possession, as against them, follows the title, it would " be a useless and vexatious course to require the purchaser to " obtain such possession by another suit. Such is not the course of " procedure adopted by a court of equity. When that Court " adjudges a title to either real or personal property, to be in one " as against another, it enforces its judgment by giving the enjoy- " ment of the right to the party in whose favor it has been decided. " And when it decrees a sale, it transfers possession to the purchaser " as against the party whose interest has been sold. The question in " this case has been fully considered by Chancellor KENT in *Kershaw* " *vs. Thompson*, 4 Johns. Ch., 609, in which all the leading authorities " are cited and examined. * * * According to the old chancery " practice, there was: *first*, the order for the delivery of possession; " *then* an attachment for not complying with the order, which was " seldom served and could be dispensed with; *afterwards* the injunc- " tion issued, which, if not obeyed, was followed by the writ of as- " sistance. In our system, the order to deliver possession should be " first made, unless a direction to that effect is contained in the de- " cree, and if upon its service that is disregarded, the Court can at " once direct the writ to issue. If delivery of possession to the pur- " chaser is directed by the decree, no preliminary order will be " requisite; but, upon proof of disobedience to the decree, the party " will be entitled, as a matter of course, to the writ as against the " defendants in the suit."

In *Skinner vs. Beatty*, 16 California R., 156, the same relief was granted.

POINT II.

But when the plaintiff in a decree has conveyed the estate or assigned his right, another condition is presented. It is not according to the analogies that his grantee or assignee should by summary petition have an order to enforce the decree; he must first make himself a party to the record. And this he will do by supplemental bill, or by a bill in the nature of a supplemental bill.

This brings us to the circumstance that Morton's interest has come to Woolworth since the decree in *Morton vs. Root*. Upon the plainest principles, Woolworth should have the benefit of the relief which the Court has awarded his grantor. He took the title of Morton relying upon the decree in Morton's favor against Root; and ought to be put in Morton's place as far as the usual processes of equity permit. And from an early day the Court has secured to a grantee the benefit of its decree in favor of his grantor, when he comes by supplemental bill for that purpose.

The principle is thus stated by Story in his Equity Pleadings:

"Sec. 335. A supplemental bill may also be filed, as well after "as before a decree; and the bill, if after a decree, may be either "in aid of the decree, that it may be carried fully into execution; "or that proper directions may be given upon some matter omitted "in the original bill, or not put in issue by it, or by the defense "made to it; or to bring forward parties before the Court, or it may "be used to impeach the decree, which is the peculiar case of a sup- "plemental bill, in the nature of a bill of review, of which we shall "treat hereafter. But where a supplemental bill is brought in aid of "a decree, it is merely to carry out and to give fuller effect to that "decree, and not to obtain relief of a different kind on a different "principle; the latter being the province of a supplementary bill in "the nature of a bill of review, which cannot be filed without the "leave of the Court."

The general rule is stated in Mitford's Chancery Pleadings in these words, pages 95 and 96 [Jeremy's Ed.]:

"Sometimes, from the neglect of parties, or some other cause, it

" becomes impossible to carry a decree into execution without the " further decree of the Court. This happens, generally, in cases " where, parties having neglected to proceed upon the decree, their " rights under it become so embarrassed by a variety of subsequent " events, that it is necessary to have the decree of the Court to settle " and ascertain them. Sometimes such a bill is exhibited by a person " who was not a party, nor claims under any party, to the original de- " cree, but claims a similar interest, or is unable to obtain the deter- " mination of his own rights till the decree is carried into execution. " *Or it may be brought by or against a person claiming as assginee of a* " *party to the decree.* The Court in these cases in general only en- " forces, and does not vary, the decree ; but, on circumstances, it has " sometimes considered the directions, and varied them in case of " mistake ; and it has even, on circumstances, refused to enforce the " decree, though, in other cases, the Court, and the House of Lords " upon an appeal, seem to have considered that the law of the " decree ought not to be examined on a bill to carry it into exe- " cution."

This passage has been quoted with approval in several judgments of this Court, the most notable of which is that delivered by Mr. Justice BRADLEY, in *Thompson vs. Maxwell*, 95 U. S., 391, 399. We speak of this as the most notable, because the learned Justice in that case (saying of the bill in the case then at bar that "the general " purpose it evidently had in view—the quieting of the title to the " land in question—is one towards which a court of equity is always " liberally disposed, as tending to promote the peace of society and " the security of property") went beyond what was called for by the judgment to point out the proper remedy for the plaintiff—the decree in his favor below having been reversed here, but with leave by this Court to amend. The case will be more fully stated hereafter.

On account of the peculiar jurisdiction of the Federal Courts, and for the purpose of expanding the same and giving effect thereto, bills of this character have been sustained, when, perhaps, in the English Chancery such a course would not have been taken.

In *Minnesota Company vs. St. Paul*, 2 Wall., 609, a bill called supplemental was filed by citizens of Wisconsin against citizens of the same State. There was an original suit to foreclose a mortgage upon a railroad in that State which was divided into two divisions. Upon the western division was the mortgage to foreclose which the suit was brought, and, under it, as was claimed, all the rolling stock

belonging to the two divisions was sold. On account of some obscurity in the orders of the Court, it became necessary for the parties in determining their rights to the rolling stock to have a declaration of what was intended by the orders and decrees made in that suit and to enforce the rights which were established by it. Mr. Justice MILLER, delivering the opinion of this Court, said, at page 633:

"It is objected that the present bill is called a supplemental bill, "and is brought by a defendant in the original suit, which is said to "be a violation of the rules of equity pleading; and that the sub-"ject matter, and the new parties made by the bill, are not such as "can properly be brought before the Court by that class of bills. "But we think that the question is not whether the proceeding is "supplemental and ancillary or is independent and original, in the "the sense of the rules of equity pleading; but whether "it is supplemental and ancillary or is to be considered en-"tirely new and original, in the sense which this Court "has sanctioned with reference to the line which divides the juris-"diction of the Federal Courts from that of the State Courts. No "one, for instance, would hesitate to say that, according to the Eng-"lish chancery practice, a bill to enjoin a judgment at law, is an "original bill in the chancery sense of the word. Yet this Court "has decided many times that, when a bill is filed in the Circuit "Court to enjoin a judgment of that court, it is not to be considered "as an original bill, but as a continution of the proceeding at law; "so much so, that the Court will proceed in the injunction suit "without actual service of subpœna on the defendant, and though he "be a citizen of another State, if he were a party to the judgment at "law. The case before us is analogous."

An early case is *Johnson vs. Northey*, Finch's Precedents in Chancery, 134 (2 Vern., 407; 2 Ch. Rep., 228), where, in 1638, the Earl of Cleveland settled estates to the use of himself for life, remainder to his son, Lord Wentworth, for life, and to the first and other sons of Lord W. in tail; in default of such issue, to the heirs female of the Earl, with power to revoke by deed. The Earl and Lord W. made a letter of attorney to Thomas Byers to sell the premises, to pay debts, and to pay the surplus as they should appoint. An Act of Parliament was passed empowering the trustees to sell to pay debts, and surplus to the Earl. Lord W. died without male issue, leaving a daughter, Lady Ph. In 1684 she conveyed to her mother, but kept the deed in her own custody, and afterwards by will devised the estates to her mother for life, and

then to be sold to pay debts, and died without issue. Lady Lovelace, as daughter of the Earl and heir at law of Lady Ph., filed a bill to set aside the deed of 1684, as gained by fraud, or as a trust for the daughter. Lady W. filed a bill to have the settlement of 1638 declared revoked, and to have all other deeds and writings which concerned the premises, claiming title by her daughter's deed of 1684. Lady Lovelace answered, and a decree *ex parte* was made against her. Pending the suit, Lady Lovelace died. Lady W. also died, having devised the lands to Northey to pay debts. Creditors filed their bill to have the benefit of the *ex parte* decree, and to have the lands sold for payment of debts. The right of creditors to file and maintain a bill to have the benefit of the decree was supported.

In *West vs. Skip*, 1 Ves., 239 (1749), there were articles of partnership between Skip, Ralph Harwood and James Harwood, which gave Skip a proportion of the outstanding debts and a lien on the partnership stock therefor, with penalty in case of a breach. Skip alleged that Ralph Harwood drew more than he ought out of the stock, and received debts without privity of Skip, and other breaches, and sued for the penalty, and had judgment. But, before execution, Ralph confessed judgment to his sisters, who sued out *elegit*, and "laid hold of the partnership stock, which was assigned by the Sheriff." There were proceedings in bankruptcy which came to nothing. Skip filed a new bill, setting forth all the above matters, praying an account and satisfaction of the breaches of covenant, and to be paid what was due to him out of the goods and effects taken in execution; and that the defendant be restrained from getting in the partnership effects to the prejudice of Skip. Decree was made accordingly. Eight days after the decree other creditors had a commission of bankruptcy against Harwood, and the assignees filed a new bill insisting that Skip had no property, either legal or equitable, against them; that he must come in with the other creditors. Skip also brought a bill to have the partnership estate first disposed of for his satisfaction, and that nothing should be considered as belonging to the Harwoods until after that deduction and to carry on the former decree. Lord HARDWICKE *held* that representatives of a partner are entitled to set off debts and have all allowances before the separate creditors of the other partner can take his share, and they have a lien for such demand. He therefore dismissed the bill filed by the assignees, so far as it sought to come upon the specific lien of Skip, but he treated the bill to carry into execution a former decree as if the jurisdiction were undoubted.

Lord Cartaret vs. Paschal, 3 Peere Williams R., 197 (1733), also assumed the jurisdiction. In marriage articles Thomas Bromsall covenanted with his intended wife to settle upon her 500 pounds per year. He died, and his widow brought her bill for the annuity, and the arrears and future payments. She also agreed to buy in a mortgage on a part of the real estate of her husband, and paid large sums thereon. It was decreed that possession of certain lands, part of the real estate of Thomas Bromsall, be devised to his widow, and that the tenants should pay arrears and future rent to her until she should be reimbursed what she had paid on the mortgage, as well as arrears of her annuity. She married Dr. Herbert; the suit was revived, and what was due her was ascertained. Dr. Herbert assigned the arrears of rent to Lord Cartaret and another as trustees, and demised the annuity to them, and at the same time made a declaration that after his wife's death the trustees should pay a debt of 500 pounds to Thomas Cross and a further debt to Lady Granville. Dr. Herbert died, and afterwards his widow died. Cross and Lady Granville claimed their debts. Lord Chancellor KING gave them the benefit of the decree which had been made in favor of the widow of Thomas Bromsall.

Lloyd vs. Johnes, 9 Ves, Jr., 37 (1803); *Binks vs. Binks*, 2 Bligh, 593 (1809); *Rylands vs. Latouche*, 2 *Id.*, 566 (1820); all present the same question and recognize the jurisdiction in a proper case.

In *Dormer vs. Fortescue*, 2 Atkyns R., 281 (1741–2), the original bill was for discovery of a deed of settlement under which the plaintiff claimed, and prayed that the same might be deposited for safe custody and produced at a trial of law, and for general relief. On the hearing, the deed was ordered to be produced and the bill was retained for a twelvemonth, and from time to time retained, and was still depending. Ejectment was brought, which resulted in judgment for the defendant. After the filing of the bill for discovery, the plaintiff brought an action in ejectment and had judgment; the defendants were in possession; the plaintiff then filed a supplemental bill for an account of rents and profits. The defendant demurred and filed his plea, which Lord HARDWICKE overruled. The case again came before Lord HARDWICKE, and is reported in 3 Atk., 124 (1744), where one of the principal questions was whether the relief could be granted upon a supplemental bill for an account of rents and profits, when the original bill did not pray for such relief. One grave objection to the bill was that an action could be maintained at law for the recovery of the rents and profits;

that objection Lord HARDWICKE overruled, saying there are many cases where relief in equity will be granted, although an action at law will lie. The other objection was that the original bill was brought for another purpose, and was confined merely to discovery of the deed of settlement and for producing the same at the trial. Lord HARDWICKE said the original bill was inartificially and defectively drawn because it did not charge possession in the defendant; but that appeared from the answer of the defendant. The great Chancellor then said (at page 133):

"I am of opinion that the original bill extends to everything "which is now insisted on by the plaintiff, and that I ought not to "confine it to the single matter of producing the deed at the trial; "and that, in the first place, the Court under this bill may very "properly give directions as to the disposition of the title deeds. "But suppose the original bill to be as defective as the defendant's "counsel would have it, could anything be more proper than to "bring a supplemental bill, to put this matter in issue, and to "supply the defects if any in the original bill. Supplemental bills "are often brought even in aid of a decree of this court, as in a de-"cree to account for want of full direction before; and directions "are given under the supplemental bill that the new matter "should be connected with the former decree. If the plaint-"iff's original bill had not prayed this general relief it was very "proper to bring a supplemental bill that he may have an entire re-"lief; and I think that they ought to be considered as one bill and "connected together." After reviewing several cases he adds that delay in decreeing the accounts of rents and profits would be attended with infinite inconvenience and that, therefore, the plaintiff was entitled to the account and (p. 129) to come into chancery for that purpose.

There are many other cases in the English books sustaining bills to carry decrees into execution, filed by parties claiming under the plaintiffs—treating them as supplemental bills, even when they allege additional grounds of relief.

Shepherd vs. Twogood, Turner & Russell R., 379.
Partington vs. Reynolds, 4 C. S. Drewry R., 253.
Matthews vs. Pincombe, 4 De Gex & Smales R., 485.
Davis vs. Bluck, 6 Beavan R., 393.
Berrow vs. Morris, 10 *Ib.*, 437.
Hodson vs. Ball, 1 Phillips R., 177.
Toulmin vs. Copland, 2 *Ib.*, 711.

The question in such cases turned upon the matter of the decree. In this country the same relief has been granted.

Grew vs. Breed, 12 Metcalf's R., 363, was a supplemental bill in which the late Benjamin R. Curtis, afterwards a member of this Court, joined as plaintiff and appeared as of counsel in support of it. The Nahant Bank issued bills, and its charter expired leaving the same unpaid; among its stockholders was an Insurance Company. A bill had been filed to subject the stockholders of the bank to the payment of the outstanding bills of the bank; after judgment in that suit, and execution against the Insurance Company the supplemental bill was filed against the Insurance Company and others, to reach certain of its assets which had been placed out of its hands. Upon demurrer of one of the defendants, objection was made to the bill; and on that subject WILDE, J., delivering the opinion of the Court, said: "It is objected that, although the Court had jurisdiction in the "original suit, it is not extended to this suit, which is on a new bill. "It is true that this is a new bill; and so are bills of revivor and "other bills. But it is not strictly original. 'A bill for this pur-"'pose (to carry into execution the judgment of a court of equity),' "said Lord Redesdale, 'is, generally, partly an original and partly a "'bill in the nature of an original bill, though not strictly original; "'and some times it is likewise a bill of revivor, or a supplemental "'bill, or both.' Mitf. Pl. (3d Ed.), 76. But, however this bill "may be denominated or defined, it is certainly founded on the "decree of the Court in the former suit; and the sole question is, "whether we have authority to cause it to be done in the form "prayed for." *Demurrer overruled.*

In *Shaw vs. Bill*, 95 U. S., 10, a bill was filed to foreclose five several and successive mortgages on a railroad. Decree was entered, *not to foreclose*, but extinguishing all liens except the first and second mortgages, and providing for reorganization by giving bondholders on the three subsequent mortgages stock in the new company. Ten years afterwards the bondholders under the first and second mortgages called on the trustee to foreclose. He did so in the State Court, and had foreclosure; and the purchasers organized a new company, which held possession until the same was taken from them by a Receiver upon the application of appellant Shaw. Shaw held a bond of the fourth issue, and stock issued for surrendered bonds under the first decree, and in virtue thereof filed his petition on the foot of that decree, alleging that the property was in the wardship

of the Circuit Court under former decrees, and that the foreclosure in the State Court was irregular. That view was sustained by the Circuit Court. Thereupon Bill, the successor of the original trustee, filed his supplemental bill for foreclosure of the mortgages remaining in force. Decree was entered and Shaw appealed. The supplemental bill was sustained, as such, without question as to the jurisdiction. Opinion by Mr. Justice FIELD.

In *Thompson vs. Maxwell*, 95 U. S., 391, Charles Bent was jointly interested with Beaubien and Miranda in a large body of land to the extent of one-third. He died leaving his son Alfred Bent and his daughters Estefana and Teresina. The title to Bent's interest stood in the names of Beaubien and Miranda, as trustees for him up to his death, and thereafter as trustees for his said heirs at law. They brought their bill alleging, in addition to these facts, that Maxwell and Pley pretended to have become interested in the lands, and praying that the title of Charles Bent to one-third be established and for partition. May 29, 1865, a decree was passed establishing Bent's title to an undivided one-fourth part of the land, the right of succession of plaintiffs, decreeing partition and appointing Commissioners to make the same, and cause continued to next term. Afterwards Maxwell negotiated for purchase of plaintiff's interest, and whether the negotiations were concluded before A. Bent's death was disputed. He died December 15, 1865, leaving his widow Guadalupe Bent [afterwards married to George W. Thompson] and their infant children Charles, Julian and Alberto. No further deeds were made. Four years afterwards the assignee of the parties and Maxwell filed a bill against her, her husband (George W. Thompson) and the said infant children, to set aside the decree and substitute a new one therefor, more advantageous to plaintiffs, upon the same facts—which was in fact a *bill of review*. The defendants answered; Guadalupe Thompson and her husband alleged that the compromise was not made with A. Bent, and that Guadalupe had not understood what were the rights of the children. The guardian *ad litem* for the infants submitted their rights to the Court. Upon this bill a decree was passed at September Term, 1873, setting the decree of 1886 aside as erroneous; and finding that settlement, after the death of A. Bent, was made, which was supposed to be advantageous to the children and was accepted by the Court, that Maxwell had paid the money, and that his assignee held the land free from the trust. Mr. Justice BRADLEY, delivering the opinion of this Court, showed that the bill could not be sustained as bill of review,

but, instead of dismissing it, pointed out the remedy by bill supplemental to the original bill which had directed that Maxwell pay the money stipulated for, and that the defendants execute deeds of conveyance never in fact executed ; he quoted the passage from Mitford set out above, and said the case fell within the rule there stated. The case was remanded for amendment of the bill and for further proceedings upon the theory suggested by the opinion.

In *Linton vs. Potts*, 5 Blackford [Indiana] R., 396, the original bill was for specific performance of a contract for the sale of lands, of which the vendee had gone into possession under the contract, but for which he had not paid because of incumbrances discovered ; there was a decree which provided, among other things, for a conveyance to the heirs of the vendee named in the contract—which conveyance was not made, and those heirs filed their bill to enforce the decree. The Court state the rule with regard to supplemental bills to be as in the quotation we have above made from Mitford—and decree accordingly.

In *Dunlap's heirs vs. McIlvoy*, 3 Little R., 270 (Ky.), the plaintiffs, together with one Warren, had formerly filed a bill for specific performance of a contract of sale of a lot of land, against John Dunlap and James G. Hunter. The plaintiff's contract was with Hunter who had conveyed to them. He, however, held by contract with Dunlap who had not conveyed to him. They had a decree for a deed from Dunlap which the latter did not make, and it was made by commissioners. It appeared afterwards that Dunlap had died after the decree, but before the deed by the commissioners. The plaintiffs by supplemental bill, years afterwards, against the heirs and devisees of Dunlap, and against others who claimed through some of said heirs or devisees, prayed that the old decree be revived against all the defendants, and that conveyance be directed. Decree was accordingly.

In *O'Hara vs. Shepherd*, 3 Maryland Chancery Decisions, 311, it was *held* that the bill in that case supplied new elements for the account by introducing matter omitted in the original bill and not put in issue by it by the defense made to it. The supplemental bill prayed for a sale of certain property and a Receiver, in addition to the relief prayed by the original bill—and the relief was granted.

In *Secor vs. Singleton*, 41 Federal Reporter, 725 ; there had been a decree in the Circuit Court of the United States, for the Eastern District of Missouri, and a final order of injunction, restraining several counties of Missouri and certain county officials from

levying and collecting, or attempting to levy or collect, taxes on the property of the Missouri, Iowa and Nebraska Railway Co.; thereafter the property to which the injunction related, was sold under a decree of foreclosure of a mortgage, prior in date to the suit in which the injunction had issued; at that sale the property was purchased by the Keokuk and Western Railway Co., against which latter Company the county officials had commenced proceedings to collect taxes, on the property, alleged to have accrued before the sale and purchase in foreclosure. The Keokuk and Western Railway Company filed a bill in the same court, praying that it might have the benefit of the decree in the suit in which the injunction had issued, and that further action be taken to enforce it; the counties demurred, objecting to the character of the bill, and that it could not be maintained after final decree in the original suit. Judge THAYER *held* it to be an ordinary supplemental bill, the proceedings to be regulated by the 57th Equity Rule—adding that: a person who, after final decree, acquires all the interest of one of the original parties in the subject matter of the litigation, may, if entitled to the benefit of the decree, as a privy in estate with him whose interest has been acquired, file a supplemental bill to enforce the decree.

POINT III.

As to the jurisdiction of the Circuit Court of the United States to entertain the supplemental bill, though both the complainant and the defendant in that bill are citizens of the same State, the practice adopted in this case is well established by adjudications of this Court.

In *Dewey vs. West Virginia Gas Coal Co.*, 123 U. S., 329, the members of the firm of Dewey, Vance & Co. were citizens of West Virginia, and the West Fairmont Gas Coal Company was a New York corporation. In October, 1872, these parties entered into a contract by which the coal company agreed to deliver to the firm a certain amount of coal. After receiving a part of the coal, the firm refused to receive any more; the coal company brought an

action at law in the State Court, in West Virginia, for damages for breach of the contract. The action was removed into the Circuit Court of the United States for the District of West Virginia. The coal company became insolvent and assigned all of its property to the West Fairmont and Marion Consolidated Gas Coal Company, a West Virginia corporation. While that action was pending in the Circuit Court of the United States for the District of West Virginia, the surviving partners of the firm filed a bill in the same court against the two corporations, alleging that the coke was not up to the sample called for by the contract and was unfit for the purpose intended; that they had suffered large damages on that account; and that the coal company had become insolvent and fraudulently conveyed the property to the other corporation impleaded as a defendant. The prayer was that the amount of complainant's damages be ascertained; that the assets of the coal company so fraudulently assigned be subjected to the payment thereof, and that, in the meantime, all proceedings in the action at law be stayed. The State statute provided that, before obtaining a judgment, a creditor could institute a suit to avoid a fraudulent conveyance, just as he could after such judgment, and have all the relief in respect of the estate which he would be entitled to after judgment for his claims. The jurisdiction was objected to on the ground that the plaintiffs and one of the defendants in the bill were citizens of the same State. Mr. Justice MATTHEWS, delivering the opinion of this Court, disposed of this objection in these few words:

"This objection, however, is not well taken; the suit in equity " was an exercise of jurisdiction on the part of the Circuit Court " *ancillary* to that which it had already acquired in the action at " law, which it might well entertain according to the rule adjudged " in *Krippendorf vs. Hyde*, 110 U. S., 276, and *Pacific Railroad Co.* " *vs. Missouri Pacific Railroad Co.*, 111 U. S., 505."

The rule in *Krippendorf vs. Hyde*, 110 U. S., 276, is that, where the bill filed is not in an original suit, but ancillary and dependent, supplementary merely to an original suit out of which it arose, it can be maintained, without reference to the citizenship or residence of the parties, in a Circuit Court of the United States in which the original suit had been pending. In the opinion of the Court by Mr. Justice MATTHEWS, it is said that the doctrine to that effect, of the case of *Freeman vs. Howe* (24 How., 450), "must be considered as " fully and firmly established in this Court," where it is expressly *held* that the power of the Court upon the supplemental bill is not

limited to a case between the parties to the original suit, but that any party may file the supplemental bill whose interests are affected by the original suit.

And in *Pacific R. R. Co. vs. Missouri Pacific Ry. Co.*, 111 U. S., 522, it is said by Mr. Justice BLATCHFORD, delivering the opinion of this Court:

"On the question of jurisdiction, the suit may be regarded as an-
"cillary to the *Ketchum* suit, so that the relief asked may be
"granted by the Court which made the decree in that suit, without
"regard to the citizenship of the present parties. * * * The
"bill, though an original bill in the chancery sense of the word, is
"a continuation of the former suit, on the question of the jurisdic-
"tion of the Circuit Court." Citing *Minnesota Co. vs. St. Paul Co.*, 2 Wall., 633 (already quoted in these points), where it is said (at p. 634) that, if the Circuit Court had jurisdiction of the matters alleged and growing out of the decree in the original suit, it had jurisdiction to that extent of the parties to the supplemental bill, without regard to their citizenship.

Lawrence Mfg. Co. vs. Janesville Cotton Mfg. Co., 138 U. S., 552, was to restrain the use of a trade-mark. The parties stipulated that the suit be dismissed, and the defendant agreed not to use the mark. The defendant was also to agree that it and its successors should not use the label. Decree was entered enjoining the defendant and its successors from using the trade-mark. The defendant was reorganized as the Janesville Cotton Mills, and proposed to use the mark—whereupon the supplemental bill was filed to obtain the benefit of the former decree. But it was shown that the decree in the original action ought not to have been entered, and on that ground alone the supplemental bill was dismissed. Mr. Chief-Justice FULLER, putting the judgment on that ground, assumes that, if the original decree had been equitable, the plaintiffs would have been entitled to the benefit of it and to the decree prayed in the supplemental bill.

POINT IV.

But it would not have availed Root to have established the allegation of his Answer that he had been in possession of the premises from 1869—in the face of his own admissions, in the Answer and in his testimony, as to what occurred after Morton's decree against him in 1873, and that he knew that first Morton and then Woolworth was, after that decree of 1873, claiming to be the owner of the premises—and in view of the clear and uncontradicted evidence that, after that decree of 1873, he never notified Morton or Woolworth that he (Root) still claimed the land (pp. 14, 48, 191, 192).

If we concede to Root all he claims in respect of possession, or by virtue of it, the case, shortly stated, is this: Root, holding a possession open, notorious, adverse and continuous, had a controversy with Morton as to the title to the lands, which was, upon full hearing on pleadings and proofs, resolved against him, and, by the decree rendered by the Court, he was ordered to make a conveyance releasing the premises to Morton within ten days from the date of the decree—the decree further providing that, if Root failed to do so, a Master should make the conveyance, which should "be as effectual in all respects as if made by the said" Root. He failed to make the deed, and it was made by the Master appointed by the Court for that purpose; thereafter Root continued in the possession in which he had before held.

If that be the case, it is the case of a grantor continuing in possession, after his deed, without notice to his grantee that he holds adversely. The rule is founded in common honesty, and well settled, that such possession is the possession of the grantee.

Jackson ex dem. Bowen vs. Burton, 1 Wendell, R., 341, was ejectment. It appeared that on the 24th of January, 1801, the defendant conveyed the premises to Benjamin Bowen, whose title, by execution sale and Sheriff's deed, came to the lessors of the plaintiff in 1817. The defendant was in possession for 27 years, and, when the action was commenced, claimed adverse possession. SUTHERLAND, J., speaking for the Court, said:

"The defendant, on the 24th of January, 1801, conveyed the "premises in question by a warrantee deed to Benjamin Bowen. By "that conveyance, all the right and title which the defendant "then had in the premises, passed to his grantee; and "even any title subsequently acquired would have inured "to his benefit. Although the defendant remained in pos- "session after the conveyance, it was not as owner, but "as tenant to his grantee; and nothing but a clear, unequivocal "and notorious disclaimer of the title of his landlord, could render "his possession, however long continued, adverse. So far from "there having been any such disclaimer, until about the time of the "commencement of this suit, it appears affirmatively in the case "that the premises have, ever since the conveyance, been known in "the neighborhood as 'Bowen's Mill Seat,' and that they have been "uniformly assessed as the property of Bowen. * * * There is "not the slightest pretense, therefore, of an adverse possession."

See, also,

Burhans vs. Van Zant, 7 Barb. R., 91, 100.
Roman vs. Meyer, 84 Indiana R., 390.

In *Kinsley vs. Ames*, 2 Metcalf R., 29, the defendant Ames conveyed the demanded premises to Wilmarth by deed of mortgage which authorized Wilmarth or his assigns to sell so much of the estate as might be necessary to pay the debt secured thereby, after the defendant's default. The mortgage came, by assignment, to Howard, who, with Ames' consent, in December, 1839, sold the premises at auction to Sproat, and conveyed them to him. Sproat conveyed to the plaintiff. In March, 1840, the plaintiff attempted to take possession, but was resisted by defendant.

Chief-Justice SHAW, speaking for the Court, said: "It is clear "that the sale of the mortgaged estate, being made in the pursuance "of a valid power given by the owner, vested in the purchaser an "estate in fee, free from the original condition, and from any right "of redemption; and this estate passed by mesne conveyances to "the plaintiff. The absolute right of property drew after it the "right of possession, and an entry upon part, by the plaintiff, and a "forcible resistance by the defendant, constituted a forcible detainer "of the residue. * * * * It is obvious that the defendant was "a tenant at sufferance. His original entry was lawful, but after a "sale, and the entry of the purchaser, he had a mere naked posses- "sion, without any right or interest whatever."

Jeffery vs. Hursh, 45 Mich., R. 59, was ejectment. On the 23rd of November, 1872, Elizabeth Hursh conveyed the premises to the ancestor of the plaintiff. The defendants were in possession under Hursh, and showed a tax deed as a paramount title. The Court said:

"Presumptively, while this tax-title was accruing, Hursh was re-
"maining in possession in subordination to her own conveyance.
"*Bloomer vs. Henderson*, 8 Mich., 395; *Humphrey vs. Hurd*, 22
"Mich., 44. If it had appeared that she had been suffered to re-
"main in possession as apparent owner, and that the other defend-
"ants had *bona fide* acquired rights under her, relying upon appear-
"ances, the case might be different (*Bennett vs. Robinson*, 27 Mich.,
"26); but nothing of the kind is shown, and no explanations are
"made. The question then seems to be, whether one in possession
"of land and neglecting to pay the taxes upon it, can rely upon a
"title derived from a sale for such taxes to defeat her own convey-
"ance which she has not perfected by a delivery of possession.
"* * * There is no showing here which puts the defendants or
"either of them in a position that would permit them to raise that
"question, and we pass it without further notice. It is plain that if
"they cannot rely for their defense on a title purchased by them-
"selves, they cannot make use of one purchased by another."

In the case now at bar, the Master's deed was, by the decree of 1873 in Morton's suit against Root, declared to be as effectual as if Root had conveyed in obedience to the command of the Court. The rule is the same in such a case as in the case of an execution—defendant, holding possession after the sale and deed of his estate by the Sheriff, is *quasi* a tenant at will of the purchaser, and his possession is not deemed adverse.

Jackson vs. Sternberg, 1 Johns. Cas., 153.
Jackson vs. Hinman, 10 John. R., 292.
Jackson vs. Collins, 3 Cow. R., 89.
Cook vs. Travis, 20 New York R., 400.
Doyle vs. Mellen, 15 Rhode Island R., 523.
Carrol vs. Patrick, 23 Nebraska R., 834, 845.

Appropriating the language of Mr. Justice NELSON, delivering the opinion of this Court in *Zeller's Lessee v. Eckert*, 4 How., 289, the possession of Root after the deed made in his behalf was in subordination to the title of Morton, and the burden lay upon Root to establish a change in the character of the possession after that period; but nothing short of an open and explicit disavowal of a holding

under Morton, and assertion of his title in himself, brought home to Morton, will satisfy the law. Short of this, Root will still be regarded as holding in subserviency to the rightful title. Again, as Root's possession after the decree was held in subserviency to the title of Morton, the real owner, a clear, positive and continued disclaimer and disavowal of Morton's title, and assertion of an adverse right, brought home to Morton, are indispensable before any foundation can be laid for the operation of the statute. Otherwise, the grossest injustice might be practiced.

POINT V.

Root assails the decree of 1873 by charging fraud in Morton and by Morton's solicitor [Woolworth] in obtaining it. The alleged fraud consisted of (1) the fact that, before filing the bill, Oliver P. Morton, the complainant in that bill, had, by his deed of 1869, conveyed the land to William S. T. Morton (his brother), and (2) the inference that he [Oliver P. Morton] therefore had no interest in the premises at the time when the bill was filed; which fact [with regard to the deed referred to] is charged to have been concealed from the Court, and is alleged to have been unknown to Root.

To this there are several answers.

1. The deed from Oliver P. Morton to his brother in 1869 was recorded in the County Registry, on the 15th day of September, 1869 (pp. 15, 122), and that record was notice to Root. If he was ignorant of it, he has himself to blame. The law imputing knowledge of it to him, his duty was to allege and prove the fact in the suit in which the decree of 1873 was rendered.

2. But, waiving that, the deed was avoided by dealings of the parties to it, subsequent to the deed and prior to Morton's suit

against Root, and title was revested in Oliver P. Morton by these dealings. He was, therefore, the proper party to bring the suit against Root. This appears by the testimony of Mr. Woolworth (pp. 188–194), who gives a clear and simple account of the whole matter. The two Mortons were brothers. There had been litigations involving these and other lands in which they were both interested—some of the litigations in the name of William S. T. Morton and one in the name of Oliver P. A writing had been made which was signed by them both. It was in effect (so far as it related to the matters here in question) a conveyance or an agreement for a conveyance of these premises here in question from William S. T. to Oliver P. Shortly before the bill was filed, William produced this writing to Woolworth (who had been acting as attorney for both the brothers) and informed Woolworth of the settlement expressed in this writing, and that in the course of that settlement he had, in effect, if not in form, reconveyed these premises to his brother Oliver P.; and it was agreed between him and Woolworth that the suit should therefore be brought in the name of Oliver. Afterwards Woolworth had a conversation in Washington with Senator Morton, who confirmed what his brother had stated.

All of this was explained on his direct examination by Mr. Woolworth as a witness in his own behalf (pp. 188, 189). To the statement by him of the contents of that writing, signed by the two Mortons objection was made—and that objection is here insisted on by the appellant in his Assignment of Errors; but the objection was merely that the paper writing should be produced *or its non-production should be explained*; and thereupon the witness, in answer to further questions, explained that the paper writing referred to had never been in his possession, was merely shown to him, on the occasion referred to, by William S. Morton, who informed the witness of its contents so far as it related to the premises in question, and then retained possession of it himself and took it away because it related to other matters—and that the witness (Woolworth) does not know what became of it (pp. 192, 193). That explanation met the objection mentioned, and no other objection was raised.

The witness, Mr. Woolworth, on cross-examination, in answer to questions by counsel for appellant (p. 194), says: "Q. Then "the whole matter, that matter as well as the matter of the "existence of the deed conveying the whole of the premises in "controverty to William S. T. Morton, was kept from the Court, was "it? A. No, sir; it was not kept from the Court. The deed from

" Oliver P. Morton to William S. T. Morton was not legal on this " account, and I alleged in the bill—and that allegation was true— " the title to be in Oliver P. Morton ; and Oliver P. Morton, at the " time of the filing of this bill, did own the premises, and they were " his in equity, and, I think, in law. The defendant did not produce " that deed, or a certified copy of it, from O. P. Morton to William " S. T. Morton ; and, if he had, I should have met him by showing " the reconveyance, or the agreement for a reconveyance, which " ever it was, from William S. T. Morton back to Oliver P. Morton.

" Q. But you knew of the existence of these two conveyances or " writings, whatever they may have been, and did not bring it to the " knowledge of the Court in any way or manner?

" A. I do not think I did. I did not feel called upon to do it. " If the point had been made, I should have met it. If that objec- " tion had been made to the title of Oliver P. Morton as alleged in " the bill, I should, as I would have had authority to do from Will- " iam S. T. Morton, have inserted his name in place of Oliver P. " Morton, and the suit would have proceeded in the name of Will- " iam S. T. Morton ; but I did not feel called upon to take any such " a course."

Nothing can be usefully added, on that subject, to what was said by Mr. Justice BREWER when rendering the decree here under examination (pp. 305–308), he says :

" It appears that Oliver P. Morton, prior to the commencement " of this suit, had executed a deed to Wm. S. T. Morton, which deed " was dated August 19th, 1869, and recorded September 15th, 1869, " in the records of this county ; and it is claimed that Oliver P. " Morton, therefore, had no title when he filed the bill, and that the " decree was obtained by fraud upon the Court ; that the defendant " was not aware of the condition of the title at the time of the suit " and decree, and is, therefore, not now precluded from raising the " question. Whatever actual knowledge the defendant may have had " from Oliver P. and William S. T. Morton, the deed was re- " corded, and therefore implied notice ; and Root is con- " cluded by a decree against him divesting his title and " vesting it in Oliver P. Morton. But, further, the " evidence shows that, prior to filing the bill, William S. T. Morton, " the brother of Oliver, called on Mr. Woolworth, the present com- " plainant, with reference to the title of this property and other " litigations ; that he produced a writing signed by the two brothers, " the effect of which was to revest the title in Oliver P. Morton ;

"that, by direction of William S. T. Morton, Mr. Woolworth "brought the suit in the name of Oliver; that afterwards Oliver "confirmed all that had been stated, and that, after the decree of "1873, William was here and settled with Mr. Woolworth for his "services in that case and other matters, and agreed that Oliver "should convey to Woolworth, as was done, an undivided "one-half of the premises. This testimony does away "with all suggestion of fraud or wrong. The title which "the Morton brothers claimed was different from the one which "defendant claimed; and it was a matter which did not concern "him in whose name the suit was brought, providing only a decree "could be obtained binding as to the respective titles. When his "title was declared bad and theirs good, it was a matter entirely "immaterial to him in whose name the decree was rendered. As to "Oliver and William, each assented to the proceeding as it was had. "Each understood that it was a decree affirming the title which they "claimed, and they dealt with the property after the decree as "though the title was really in Oliver and not in William. Some "question was made as to the sufficiency of the deed from Oliver to "William in August, 1869, because there were no witnesses to it. "But I put no stress upon that. The legal title was doubtless con-"veyed by that deed. The two brothers assented to the suit in the "name of Oliver, had signed papers purporting to revest the title, "and after the decree recognized the title as in Oliver. There was "no wrong or fraud in this, and equity sees nothing of which the "defendant can now avail himself to justify his attempt to avoid the "effect of that decree."

(3) The case having been thus disposed of by the finding of the Circuit Court upon the merits, after an examination of the evidence; and the transcript of the record here showing abundant testimony to sustain that finding; and there being nothing in the Assignment of Errors to disturb such finding; it cannot be necessary to call attention to the long settled rule that, whatever his remedy may be, if any he has, Root was not entitled to raise and litigate, by his answer filed in 1889 in this suit, that charge of fraud with regard to the judgment of 1873 against him. But if it should be considered that, by his Assignment of Errors, the appellant has raised a question as to that finding, we should rely upon the rule mentioned. There are many cases in the books where a defendant has alleged, in his answer to a supplemental bill in equity, circum-

stances to show that the original demand [on which the judgment sought to be enforced by the bill was rendered] was unjust and fraudulent, and that the decree itself on which the judgment was entered was obtained by fraud—but where the Courts have *held* that, as to matters which have been urged, or could have been urged, in defense of the former suit, they could not be considered as a defense to the supplemental bill, and that the decree sought to be enforced could not be set aside for fraud *except* by an original bill brought for that direct purpose. And while one would, in a proper case, have a right to file a bill by way of direct attack upon a judgment against him which is charged to be fraudulent, it is settled that he cannot, after long years have elapsed since that judgment was entered, and after the rights of others have come in, support even such a bill for any reason that was known to him, or by due diligence might have been ascertained by him, in time to make use of it in preventing the passage of the decree complained of—that " the requirement of diligence " is, as it ought to be, enforced with strictness."

Marshall vs. Holmes, 141 United States Reports, 600.

The recent decisions of this Court enforce that rule, even against one proceeding by motion in the original suit in which the fraud is alleged to have been practiced, or intervening by a direct suit to set aside the judgment alleged to be fraudulent—especially where the subject of the alleged fraud is lands, and the party complaining is a resident of the neighborhood and asserts that he all the time had and claimed a property interest in the premises.

Foster vs. Mansfield, &c. R. R. Co., 146 United States Reports, 88.
Felix vs. Patrick, 145 United States Reports, 317.
Hammond vs. Hopkins, 143 United States Reports, 224.
Hoyt vs. Latham, 143 United States Reports, 553.

In the case at bar, not only is the alleged fraud charged to consist of the failure of Morton and his solicitor to call the attention of the Circuit Court in 1873, in a suit against this appellant himself, to a deed which had been of public record since 1869 in the county of this appellant's residence—with knowledge of which he now is, and in 1873 was, chargeable—being a deed of lands he now avers he has all the time owned and been in possession of; but it was not until his answer was interposed in this suit in 1889 that any one ever heard of any charge of fraud in the matter referred to, though the judgment appellant complains of and now alleges to be fraudulent

was rendered against him *sixteen years before*, and the rights of this appellee have meantime come in—rights which, in purchasing and exercising them, have cost this appellee many thousands of dollars, expended for and upon the premises, and in reliance upon that decree of 1873. Surely there could be no suggestion of diligence on the part of this appellant in such a case.

POINT VI.

The title of Oliver P. Morton has come to Woolworth.

On the 24th of June, 1873, Oliver P. Morton and his wife conveyed an undivided half of the premises to Woolworth (p. 246). The making of that deed is admitted in the answer.

On the same day, Oliver P. Morton conveyed the other undivided half to his brother, William S. T. Morton (p. 292).

On the 4th of June, 1879, the executors of William S. T. Morton conveyed the said latter undivided half of the premises to Woolworth (p. 245), and on the 13th of June, 1889, they made a confirmatory deed to him (p. 247).

William S. T. Morton died, leaving a will, of which Thomas McCullough and William A. Peelle were executors, and his widow, Eliza M., was executrix, which was admitted to probate in the Circuit Court of Wayne County, Indiana. Afterwards an authenticated copy of the will and of the proceedings on the probate thereof were duly filed in the proper Court of Nebraska. See deposition of Mr. Peelle (p. 22), and the additional transcript which has been supplied by the appellee to complete the transcript filed here by appellant, as already mentioned in these Points and herebelow again explained.

It is objected by the appellant that the deeds of the executors of the will of Mr. Morton were without authority of law, because not supported by an order of the Nebraska Court.

The seventh item of the will contains this clause (pp. 245, 246, 293, 306): "I hereby and herein fully authorize and empower my "executors * * * to grant, bargain, sell and convey, and, if

" need be, mortgage, any and all real estate, and deeds, releases and " mortgages to make and acknowledge, as amply and fully as I could " do were I living."

The will was in evidence in the Court below, with the proceedings in Douglas County, Nebraska, admitting it to probate there and granting letters testamentary (p. 293), and Judge BREWER, in his opinion, quotes the material clause of it (p. 306); but the appellant did not make it a part of the transcript of the record filed and printed here; the will and the proceedings in Nebraska have, however, been now supplied by the appellee, under stipulation of the parties, to complete that transcript, and are, upon motion and by order of this Court, allowed to be taken as and made a part of the record here; see printed pages 1–14 of the exhibits so supplied.

By the will, the executors were clothed with two distinct characters. They had, *first*, the functions which the statutes of Nebraska confer on executors; and, *secondly*, they were donees of the power to sell, conferred by the will. The exercise of the power under the will does not depend upon the statutes in question, but is independent of them. Upon this point, *Taylor vs. Benham*, 5 How. R. 233, 267, is decisive in this Court. And many cases are to the same effect, as are all the text writers.

Conklin vs. Edgerton's Adm., 21 Wendell R., 430.
Same Case (in the Court of Errrors), 25 Wendell R., 224.
Tainer vs. Clark, 13 Metcalf R., 220.
Newton vs. Brownson, 13 New York R., 587.

POINT VII.

But altogether aside from the effect of Root's pretended possession after the decree in 1873 in Morton's suit against him (the benefit of which decree is sought by this supplemental bill), the fact is that Root never had possession, and never after that decree asserted any claim to the premises, until the year 1888 and shortly before this suit was commenced.

The dealings of Morton and Woolworth in respect of the premises deserve the first attention. And what they did, particularly what Woolworth did, taken in connection with the fact, shown by the uncontradicted testimony, that Root never advised Woolworth of his pretensions (pp. 48, 191), effectually excludes the idea that Root, after the decree of 1873, made any claim to the land which could constitute adverse possession, or claim of adverse possession.

In the first place, Morton and Woolworth, until the deed of the former to the latter—and after that to the hearing, Woolworth—paid all of the taxes, State, County and City taxes—general and special taxes—and Root never paid a dollar of them or upon account of them (See pp. 178 *et seq.* and 224 *et seq*).

In the second place, in the most public way, Woolworth dealt with the land as his own. The city maps marked the premises as belonging to Morton and Woolworth until Morton's executor conveyed to Woolworth, and after that as belonging to Woolworth (see Reed's testimony, pp. 291, *et seq.*). Some of those maps were in the City Directory. It is not very reasonable that a man who means to keep up a claim to lands in the city in which he lives, and who must have known of these publications, should not raise his voice against an assertion of an adverse title made in so public a manner. Nor is this all: Woolworth laid the lands out as an addition to the City of Omaha, under the name of "Oakhurst." The publicity of this act deserves notice. The "Compiled Statutes of Nebraska," 1883 (Chapter 13, pp. 83, 84), provide for laying out lands as an addition to such a city, as follows:

"SEC. 4. (Additions to City.) The proprietor or proprietors of "any land within the corporate limits of a city of the first class, or "adjoining and contiguous to the same, may lay out said land into

" lots, blocks, streets, avenues, alleys and other grounds under the " name of , addition to the city of , and " shall cause an accurate map or plat thereof to be made out, " designating explicitly the land so laid out and particularly describ- " ing the lots, blocks, streets, avenues, alleys and other grounds " belonging to such addition. The lots must be designated by " numbers, and the streets, avenues and other grounds by " names or numbers, and such plat shall be acknowledged " before some officer authorized to take the acknowledgment of " deeds, and have appended a survey, made by some competent " surveyor, and said surveyor shall certify that he has accurately " surveyed such addition, and that the lots, blocks, streets, avenues, " alleys, parks, commons, and other grounds, are well and accurately " staked off and marked; and when such map or plat is so made out, " acknowledged and certified, and after being approved by the " Mayor and Council, the same shall be filed and recorded in the " office of the County Clerk of the county; and thereupon such " plat shall be equivalent to a deed in fee simple to said city from " the proprietor or proprietors of all streets, avenues, alleys, public " squares, parks, and commons, and of such portion of the land " as is therein set apart for public and city use, or is " dedicated to charitable, religious or educational pur- " poses; and all additions thus laid out within the " said corporate limits shall remain a part of such city; " and all additions now or hereafter laid out adjoining and contigu- " ous to the said corporate limits, shall be included within the same, " and be and become thereupon a part of such city for all purposes " whatsoever; and the inhabitants of such addition shall be entitled " to all the rights and privileges, and subject to all the laws, ordi- " nances, rules and regulations of the city to which said land is an " addition; *Provided*, the Mayor and Council shall have power by " ordinance to compel the owners of any such additions to lay out " streets, avenues and alleys, so as to have the same correspond in " width and direction and be continuations of the streets, avenues " and alleys in the city or in addition thereto, contiguous to or near " the proposed addition; and no addition shall have any validity, " rights or privileges as an addition unless the terms and conditions " of such ordinance are complied with, and the plat thereof shall " have been submitted to and approved by the Mayor and Council, " and such approval endorsed thereon."

The appellant has not made it a part of the transcript of the

record below, which he filed in this Court; but the printed record shows (p. 286) there was put in evidence a certified copy of the plat of "Oakhurst," showing streets, blocks and lots with the action of the City Council (p. 293); and the Exhibits have now been supplied by the appellee, under stipulation of the parties, to complete the record here; see printed pages 17–21 of the addition to the transcript. This was a proceeding of the most public character—one of which a citizen of Omaha will be presumed to have had knowledge, especially a citizen who was asserting an interest in the very lands mentioned in the plat.

In the third place, it is shown that in 1883 and 1884 Woolworth caused all of the timber and undergrowth on this land to be cut, and appropriated the same without a word from Root. The work was done by August Doll; he was employed to do it by George C. and George W. Ames (p. 172); the latter were agents of Woolworth (pp. 201 and 207) in that matter, and, as Woolworth's agents, quite extensively advertised the lots for sale and actually sold a number of them (p. 207).

It is something of a draft on one's credulity to ask him to heed Root's pretension now that, all this time, he was asserting an interest in these lands as against Woolworth, or was even in his own mind harboring the thought that he had, or that he ever could gain, such an interest as against Woolworth—and that he kept silence.

Nor did he do any one thing which showed any purpose on his part to claim or assert title as against Woolworth.

1. In his answer he claims adverse possession from 1869 to the filing of the bill (p. 18); and in his testimony he claims possession from 1865.

2. Let us see how he makes it out. In 1869 he commenced to clear and grub out about two acres, and when, in 1870 and 1871, he had done so, he planted the ground to potatoes; but that two acre tract was in the midst of the woods (pp. 39, 45, 46, 76). That clearing and planting he set up in his former case wherein Morton was plaintiff; and Judge DILLON then *held* it was not an open and notorious possession. And, if it had been, it would not help him in the case now at bar. Authorities already cited in this brief show that any possession Root had *prior* to the decree in 1873, in Morton's suit against him, was by that decree terminated forever upon a claim of adverse possession in this present suit. In 1873, and in other years, he cut some of the trees and hauled the wood to his house in town. But he tells us that others did the same (pp. 47, 48). So, too, having removed from

Omaha some distance into the country, he sometimes, in coming to or going from Omaha, camped overnight on these lands; he did not sleep in a house, but laid out in the open air (pp. 41, 47, 77).

3. More serious is his pretension that, for a very long time, he occupied the land by his tenants; he says he had a family living on the lands from 1875 to 1877. If he has told a tale on that point that anybody will believe, he has done something towards his case. He says he never knew of but one house on the tract (p. 47). This was built in 1875. He does not know who built it. It remained there until 1882. He does not know what became of it. He knows it is gone, and "that is all there is about it." He says "Mr. Pierce" lived in the house from 1875 to 1879 (p. 43) whose name was "M. R." or "J. H. N." (p. 48); and that, from 1879 to 1883, Mr. Aiken lived there.

There is very good reason to believe that "Mr. Pierce" is a fiction, an invention of Root. There was a man named Isaac N. Pierce, who was Superintendent of the Poor Farm, which was immediately west of the premises in question. But Isaac N. Pierce [who had removed from Nebraska and was residing in Utah] was found by appellee and testifies that he never lived on the premises in question, and never knew a man of the name who did live there; that he would certainly have known it if there had been any other Pierce there, for [whilst he was a resident of Nebraska and Superintendent of the Poor Farm near Omaha] he passed the premises almost daily going to town (p. 25).

August Doll (p. 171), Brown (p. 174), Hans Rasmussen (p. 293) and Chris. Rasmussen (p. 303), who lived immediately near the premises and were frequently on the land, testified they knew no such man. Curry (p. 132) tells of an alleged man of the name who (he says) lived there; but he also says the man to whom he gave the name at one time lived on a lot in town which he rented from Byron Reed. Reed, however, says that man's name was C. W. Prince (p. 36). No such person as the pretended "Pierce" appears on the directories or poll-lists (p. 293).

No one of all Root's witnesses (other than Curry) mentions such a man, except Gallagher (p. 82). Root and Gallagher say that "Pierce" gave up the house on the premises which he lived in to Aiken (pp. 43, 82); but Aiken was found and sworn by appellee, and says that he never knew such a man as "Pierce," and that he himself (Aiken) did not occupy a house on the premises in question,

or on any premises on which such a man as the alleged "Pierce" lived (pp. 214-218).

The occupancy of the premises by Aiken is matter of interest. Root and Gallagher give a circumstantial account of Aiken's living in the "Pierce" house on the premises from 1879 (pp. 43, 82). But Aiken was (very unexpectedly to them) produced from Arkansas, and denied the whole tale. He testified he lived on land belonging to General O'Brien, adjoining the premises in question, and as tenant of O'Brien: he gives the most minute explanation of the way he came to go on O'Brien's land, and how he built his own house there, and excludes all possibility of any connection with the premises here in question or with Root (p. 214-223). See also Drexel's testimony about Aiken (p. 222). After Aiken had exploded the theory of Root, an attempt was made to show some conversation to which Aiken, Root, O'Brien and others were parties; but it was a sorry failure (pp. 219, 220, 161, 156, 158). If there ever was such a conversation, it could not have had reference to the so-called "Pierce" house, or to Aiken's living in it, as Root and Gallagher had previously testified; for, *in the first place*, they would have referred to it when first on the stand; *in the next place*, they first swore Aiken lived in the "Pierce" house, (pp. 43, 82); and when that story was disproved they said Aiken was to build his own house (p. 161); *and, lastly*, at first they located Aiken on the lands in question in 1879 (pp. 43, 82), and their pretended conversation with Aiken about his going there was afterwards said to have been in 1882 (pp. 156, 161, 162).

The truth is, when their tale was concocted and first told, Aiken was supposed to be beyond reach; when he was produced, and contradicted them, they were at their wit's end.

But even if there ever was such a man as "Pierce," and it were true that he was in possession of the premises and turned the possession over to Aiken, Root has not connected himself with them, or with either of them. All that Root says is that they lived there by his "*permission*." Gallagher don't pretend to know anything of the manner in which, or terms on which, "Pierce" went upon the land, and no other of Root's witnesses helps him out. That one, who has no title to a tract of land, *permits* another to continue to live on it does not make adverse possession as against the real owner of the land; and, having already shown in Point IV. of this brief that, if Root was in possession at all, it was as the *quasi* tenant at will of Woolworth, any "permission" from Root to "Pierce" or Aiken to occupy the

premises is necessarily to be treated in this suit as permission to do so as *quasi* tenants at will of Woolworth themselves; Root could not give any effectual *permission* to "Pierce" or Aiken to occupy the land by a title better than his own.

There never was a more trifling case of "possession" alleged by one claiming adversely.

At this point, the situation of the case calls for attention. It may be true that, had Root gone out of the premises and afterwards returned to the lands and taken possession with notice to Mr. Woolworth, or with knowledge to be imputed to Mr. Woolworth, that he was claiming adversely, the matters in judgment here could not have arisen. It may be consistent with what has been said of the right of a plaintiff in a decree to a summary process for possession--and of the right (upon supplemental bill) of the grantee of the plaintiff in a decree to the benefit of the relief granted in that decree---that the defendant, by an independent possession or by any other independent claim of right, will defeat the application of the plaintiff in the original suit, or of his grantee suing by supplemental bill. But that is not this case. Both in his answer and in his testimony, Root initiates his claims by *acts which antedate the decree in Morton's suit against him*, and he supports those claims by allegations of a pretended continuous series of acts based *upon what he testifies he had done before Morton's decree against him.*

The answer may be reviewed most carefully, and it will be found to contain not one single one of all its fictions which does not rest on what Root says he had done as early as 1869. He came before Judge DILLON in 1873 and said: "Glass had a good title to these premises, and he conveyed it to me. Besides that, I am in posession of the land and have been in possession for years." He came before Judge BREWER in 1889 and said: "Glass had a good title to these premises and conveyed to me. I was in possession in 1873 and long before." All he adds now, to what he alleged in 1873 or in 1879, is that his possession taken in 1869 has continued to this day.

The bill alleging as a ground for the complainant's claim to relief that Root's pretensions are what have been determined by the adjudications against him in Morton's original suit to which the one now at bar is suplemental; and Root in his answer and testimony in effect confessing that fact;

and the matter of subsequent possession being out of the way—the case for the supplemental bill by Woolworth, in this suit, is made out.

The decree appealed from should be affirmed, with costs.

Dated New York, October 28, 1893.

Respectfully submitted,

BURTON N. HARRISON,

J. M. WOOLWORTH,

Of Counsel for Appellee.